No. 89-1549

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In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANK LEE, et al
Petitioners,
vs.
FEDERAL DEPOSIT INSURANCE CORPORATION
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the Federal Deposit Insurance Corporation as assignee of a failed state bank sues the former directors of the bank, does the statute of limitations prescribed by Section 2415 of the Judicial Code "accrue" as that term is used in the statute when the right of action comes into existence or when it is assigned?

2. In such an action, should the law of the state in which the claim arose or "federal common law" provide the rule of decision regarding the characterization of the claim as a "tort" or a "contract" for purposes of determining the applicable limitations period?

> NOTE: Petitioners reserve the right to argue Question 3 in the event certiorari is granted on one or both of the above questions, but do not include Question 3 among the reasons for the grant of certiorari.

3. If federal law should provide the rule of decision, should such claims be characterized as tort or contract claims under federal common law?

PARTIES

Petitioners are Frank Lee, Larry A. Schoenborn, John Molendyk, Irving W. Potter, John Rowell, and Thomas Wolf.

Respondent is the Federal Deposit Insurance Corporation.

Other parties in the court from which this appeal is taken who are not parties to this petition are Daniel R. Adams, W. Todd Coffelt, Steven Hungerford, Charles A. Dale, Gene A. Rickert, P. Dean Nichols, Joyce Evans, K. Peter Norrie, Gary L. Dennison, Lewis Johnson, George Hammond, C. Dale Brookens, Joseph Cejka, and Lester Hardy.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioners Frank Lee, Larry A. Schoenborn, John Molendyk, Irving W. Potter, John Rowell, and Thomas Wolf respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 13, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 2-23) is reported at 884

F.2d 1304. The opinion of the United States District Court for the District of Oregon (App. 24-51) is reported at 705 F.Supp. 1304.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on September 13, 1989. A timely petition for rehearing, filed on September 26, 1989, was denied on December 22, 1989. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

APPLICABLE FEDERAL LAWS

28 U.S.C. Section 2415:

> (a) Subject to the provisions of Section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: * * *
>
> (b) Subject to the provisions of Section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: * * *

28 U.S.C. Section 2416(c):

> For the purpose of computing the limitations periods established in Section 2415, there shall be excluded all periods during which — * * *
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances: * * *

STATEMENT OF THE CASE

I. Nature of the Controversy.

This case arises out of the failure of United Bank of Oregon ("UBO"), which was formed on January 3, 1983, by the merger of Metropolitan Bank ("Metropolitan"), Willamette Falls State Bank ("Willamette Falls"), and Independent Bank of Sandy ("IBS"). (App. 75.) Before the merger, the predecessor banks had each been experiencing financial difficulty. As a result, the Federal Deposit Insurance Corporation ("FDIC") had been monitoring their respective activities and acting in an advisory capacity to their boards since 1980. [1]

In August, 1981, the Metropolitan board had hired Craig Robinson as chief executive officer and a director at the urging of Oregon's Superintendent of Banking. (App. 139-141.) Robinson promptly instituted

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[1] In its First Amended Complaint, FDIC alleges that it had been issuing unfavorable audit reports to each of the banks since 1980, and that it had issued a cease and desist order to Willamette Falls in 1982. (App. 79-82, 88-93, 96-98, 100-107, 109-115, 117-120.)

reforms, dismissing unsatisfactory employees, tightening collection efforts, and restructuring operations. (App. 142-144.) By the end of 1981, several Metropolitan board members had resigned because of perceived conflicts of interest. (App. 145.) In the same period, Robinson served as a consultant to IBS and Willamette Falls. He was instrumental in planning the merger. (App. 145-146, 148-149.) With the merger, Robinson and James Chester became respectively UBO's chief executive officer and chief operating officer; both became directors. (App. 146.) The remaining positions on UBO's board were filled by former directors of the predecessor banks. (App. 30-31)

On March 2, 1984, state regulators declared UBO insolvent and FDIC was appointed receiver. (App. 78-79.) As receiver, FDIC assigned to FDIC in its corporate capacity all claims and causes of action of UBO, including "those the banks and their shareholders had against the defendant officers and directors." (App. 74-75.)

II. Proceedings Below.

On February 27, 1987, FDIC filed a complaint in Oregon federal district court against twenty former officers and directors of the predecessor banks. (App. 68.) Federal jurisdiction was based on 12 U.S.C. Section 1819. (App. 73.) Alleging breach of fiduciary duty, negligence, statutory violations and indemnity, FDIC sought damages purportedly resulting from improvident and uncollectible loans made by the pre-

decessor banks between 1979 and January, 1983. (App. 36, 70-71, 77.) Eight defendants moved for summary judgment on statute of limitations grounds. (App. 30.) The district court dismissed the indemnity claims, reasoning that FDIC could not recover on that theory. [2] (App. 36-38) It granted the motions against the remaining claims for negligence, breach of fiduciary duty and federal and state statutory violations, reasoning that these were torts, and that the 3-year statute of limitations prescribed by 28 U.S.C. Section 2415(b) therefore applied. (App. 38-43) The district court further held that the statute began to run no later than January 3, 1983, when the banks merged, rejecting FDIC's arguments that the claims did not accrue until the assignment and that the statute was tolled due to the alleged domination of the UBO board by defendants. (App. 43-47)

On September 13, 1989, the Ninth Circuit reversed as to the limitations period for the breach of fiduciary duty claims, [3] holding that the claims "accrued" for purposes of Section 2415 when they were assigned, not when they actually arose, and applying principles of federal common law to hold that the breach of fiduciary duty claims sounded in contract and were,

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[2] FDIC did not appeal this ruling.

[3] The court noted that although the district court determined the applicable statutes of limitations for three of appellant's claims, "FDIC contests on appeal only the limitations period for its breach of fiduciary duty claims. Accordingly, we express no opinion as to the proper limitations periods for appellant's other claims." (App. 9-10, n.1)

therefore, subject to the six-year period of limitations prescribed by 28 U.S.C. Section 2415(a). (App. 13, 22-23.) Thus, the Ninth Circuit allowed FDIC to pursue an action commenced in 1987 for loans which it alleged were improvidently made beginning in 1979, eight years earlier. A petition for rehearing was denied on December 22, 1989.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The statute of limitations issues presented by this petition are unquestionably of national importance. FDIC plays a central role in the liquidation of most failed banks, which is becoming increasingly common.[4] It regularly sues directors in such circumstances.[5] The range of depository institutions over which FDIC has regulatory control has recently been greatly expanded. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No.

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[4] *Gunter* v. *Hutcheson*, 674 F.2d 862, 865 (11th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982), *overruled on other grounds*, *Langley* v. *FDIC*, 484 U.S. 86 (1987). Nationally, there were 179 commercial bank failures between January 1, and October 26, 1989. *Consolidated Bancorp Subsidiaries Closed Bringing Texas Bank Failure Total to 122*, [July-Dec.] Banking Rep. (BNA) No. 17, at 633 (October 30, 1989).

[5] Comment, *FDIC and FSLIC Pursuit of Claims Against Officers, Directors, and Others Involved with Failed Lenders*, 58 Miss. L.J. 89, 104 (1988). ("FDIC spokesmen readily admit that the agency always sues officers and directors whenever a bank fails").

101-73, 103 Stat. 183. The number of similar cases will undoubtedly continue to grow with the number of bank failures.

The statute of limitations issues presented by this case are likely to occur in any action brought by FDIC upon an assigned state law claim. This Court should address these issues to provide additional guidance as to how they should be resolved in accordance with the language of the statute, existing precedent from this Court and Congressional intent.

I. This Court should grant review to resolve the conflict among the circuits and correct the Ninth Circuit's misinterpretation of the term "accrues" in Section 2415 of the Judicial Code.

A. The conflict among the circuits.

Section 2416 [6] of the Judicial Code prescribes the general statute of limitations for actions by the government. It gives the government six years to sue on a contract and three years to sue for a tort. In either case, the limitation period starts to run when the "right of action accrues." The Ninth Circuit interpreted Section 2415 to mean that the government's right of action on an assigned claim does not accrue until the assignment date. (App. 22-23.)

Before the Ninth Circuit issued its opinion in this case, the Tenth Circuit had held in *FDIC* v. *Petersen*, 770 F.2d 141 (10th Cir. 1985), that the statute of limitations on an assigned claim begins to run when

[6] The statute is set out at p. 2, *supra*.

the claim accrues in the hands of the assignor, not when it is later assigned to FDIC. *Id.* at 142-43. *Accord FDIC* v. *Galloway*, 856 F.2d 112 (10th Cir. 1988). More recently, without any analysis or elaboration, the Eighth Circuit held that the government's claim does not accrue until the date of assignment. *FDIC* v. *First Interstate Bank of Des Moines*, 885 F.2d 423 (8th Cir. 1989). *See also FDIC* v. *Hinkson*, 848 F.2d 432, 435 (3rd Cir. 1988) (dicta); *FDIC* v. *Cardona*, 723 F.2d 132, 134 (1st Cir. 1983) (dicta). Thus, there is an acute division among the circuit courts on this issue. [7]

B. The Ninth Circuit's misinterpretation of Section 2415.

1. The Ninth Circuit's analysis.

Although the Ninth Circuit recognized the importance of "statutory language, principles of statutory construction, and policy" in its interpretation of Section 2415 (App. 17), it never actually analyzed the

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[7] The same division exists among the district courts. *Compare, FDIC* v. *Greenwood*, 701 F. Supp. 691, 694 (C.D. Ill. 1988) (FDIC's cause of action accrued when the defendants first committed their allegedly negligent acts, not when the FDIC acquired the assets of the failed band); *United States* v. *Cardinal*, 452 F. Supp. 542, 544 (D. Vt. 1978) (statute of limitations begins to run when the claim can first be sued on, even if the government has not yet acquired claim) *with FDIC* v. *Carlson*, 698 F. Supp. 178, 180 (D. Minn. 1988) (accrual when claim in assigned to government); *FSLIC* v. *Burdette*, 696 F. Supp. 1196, 1200 (E.D. Tenn. 1988) (same); *FDIC* v. *Hudson*, 673 F. Supp. 1039, 1041 (D. Kan. 1987) (same); *FDIC* v. *Buttram*, 590 F. Supp. 251, 254 (N.D. Ala. 194) (same).

language or purpose of the statute. Instead, it apparently concluded that Section 2415 is ambiguous, citing Section 2416(c) of the Judicial Code, which tolls the limitation periods under Section 2415 when the material facts "are not known and reasonably could not be known" by a responsible government official. (App. 17-21.) It then resolved the ambiguity in favor of the government. (App. 21.)

2. Section 2415 is not ambiguous.

Section 2415 allows the government to sue three or six years after the right of action "accrues" on an assigned claim, not after it first acquires a claim that has previously accrued. The statute neither expressly nor impliedly creates an exception for cases in which an existing right of action is later acquired by the government. [8] Thus, the Ninth Circuit's interpretation is inconsistent with the plain meaning of the statute.

The Ninth Circuit's interpretation is also directly contrary to this Court's previous interpretation of the word "accrues" in a similar statute. In *United States* v. *Lindsay*, 346 U.S. 568, 569 (1954), the Commodity Credit Corporation ("CCC") sued for a breach of contract which had occurred in 1945. In 1948, a

[8] Courts have no power to create an exception to a statute of limitations that the statute itself does not contain. *McIver* v. *Ragan*, 15 U.S. (2 Wheat) 25, 29 (1817). Federal statutes must be interpreted and applied as written, unless there is a salient ambiguity. *Burlington No. R. Co.* v. *Oklahoma Tax Comm.*, 481 U.S. 454, 461 (1987).

statute of limitations was enacted for suits by the CCC which allowed six years from the date the claim "accrues" to file suit. The government argued that the limitations period did not start to run until the statute took effect. Noting that "[i]n common parlance a right accrues when it comes into existence," 346 U.S. at 569, and relying upon a presumption that Congress used the word "accrued" in accordance with its "ordinary meaning," this Court held that the government's claim was barred because its cause of action accrued in 1945. 346 U.S. at 571. [9]

3. Section 2416(c) of the Judicial Code does not render Section 2415 ambiguous in the context of this case.

The Ninth Circuit apparently concluded that Section 2415 was ambiguous at least in part because of the tolling provision articulated in Section 2416(c), implicitly accepting FDIC's argument that it "had no authority to enforce the bank's claims" until it was appointed receiver for UBO. (App. 19.) Nothing in the text of Section 2416(c) supports such a result. It is not clear from the text that the statute was intended to apply to assigned claims, and only one court other than the Ninth Circuit has so applied it, in a case involving fraud. *FDIC* v. *First Interstate Bank of Des Moines*, 885 F.2d at 423. Even if it was, how-

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[9] Because Congress enacted Section 2415 after *Lindsay* was decided, it must be presumed that Congress intended to adopt the pre-existing judicial definition of the word "accrue." *Davis* v. *Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989).

ever, it is evident from the text that Congress did not intend Section 2416(c) to change the *accrual* date of a claim that existed before the government acquired it. At best, Section 2416(c) would simply *toll* the limitations period after acquisition of the claim in appropriate factual circumstances. If Congress had intended to change the accrual date of a pre-existing assigned claim, it was fully capable of articulating that purpose.

Interpreted as it was by the Ninth Circuit, Section 2416(c) would create the odd result that the state statute of limitations on a claim in the hands of a private party could be substantially lengthened by the simple fortuity of assignment to the government, since arguably no government official has the "responsibility to act" on any claim until the claim belongs to the government. [10]

This result is inconsistent with basic statute of limitations principles enunciated by this Court. Ever since *United States* v. *Buford*, 28 U.S. (3 Pet.) 12, 30 (1830), the Court has recognized that "the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor." This rule was followed in an analogous context in *Reading Co.* v. *Koons*, 271 U.S.

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[10] It is settled law, which seems contrary to the Ninth Circuit's construction, that a state law claim which has expired before assignment is not revived by assignment to the federal government. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 141-42 (1938); *FDIC* v. *Carlson*, 698 F. Supp. at 180; *FDIC* v. *Bird*, 516 F. Supp. 647, 650 (D.P.R. 1981).

58 (1926). There, this Court held that a claim for wrongful death under the Federal Employers' Liability Act accrued on the date of injury and not when a personal representative was later appointed to pursue the claim. The Court refused to believe that Congress "intended to allow an indefinite period within which application may be made for the appointment of an administrator as the prerequisite to an action for wrongful death." 271 U.S. at 63. The Ninth Circuit's ruling simply cannot be reconciled with this Court's decisions in *Buford* and *Koons*. [11]

4. The legislative history of Sections 2415 and 2416(c) supports petitioners' interpretation of the statute.

Given the Ninth Circuit's holding that Section 2415 is ambiguous, this Court should consider the legislative history of the statutes in question. It squarely supports petitioners' interpretation.

The essential purpose of Sections 2415 and 2416(c) was to place the government and private litigants on an equal footing and to insure timely action by the

[11] In addition, the Ninth Circuit's holding cannot be reconciled with the factual circumstances of this case. Here FDIC never asserted in the trial court that the statute should be tolled during some period in which responsible officials were ignorant of material facts, and never produced any evidence that such circumstances ever existed. Since FDIC was continuously and intimately involved with the banks both before and after the merger, it is difficult to see how FDIC could not have known, all along, of the material facts supporting these claims.

government. According to the House Committee on the Judiciary, the "*equality of treatment*" provided by the bill was "required by modern standards of fairness and equity." [12] The committee summarized the impact of Section 2415 as follows:

> In recommending this legislation, the committee feels that it will provide a greater fairness as regards private individuals who deal with the Government while adequately providing for the interests of the Government. The Government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in Government claims proceedings. [13]

The Senate Report noted:

> [m]any of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. [14]

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[12] S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 2503 (emphasis added).

[13] *Id.* at 2509. *See also Id.* at 2502, 2508 ("fairness . . . is a very important consideration and the principal basis for the bill").

[14] *Id.* at 2509.

In considering Section 2416(c), the Senate Judiciary Committee stated in its report:

> This provision is required because of the difficulties of Government operations due to the size and complexity of the Government.
>
> * * *
>
> The committee understands the principal application of this exclusion will probably be in connection with the fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action. [15]

The legislative history of Sections 2415 and 2416(c) establishes that it was Congress' intent to place the government and private litigants on an equal footing in litigation, and that litigation be pursued expeditiously. The Ninth Circuit's conclusion that the claims did not accrue until assignment to the government clearly gives the government an advantage which has never been accorded to private litigants, and permits considerable delay in bringing a claim.

Similarly, the tolling period provided in Section 2416(c) was intended to foster fairness and equity by accounting for the "size and complexity" of the government and guarding against possible fraudulent

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[15] *Id.* at 2502, 2507-08.

concealment of claims. It simply placed the government on an equal footing with private litigants by providing a tolling period similar to those found in state law. It was not intended to afford the government a significantly longer period to sue than a private person would have.

5. Summation.

This Court should grant review to resolve the conflict between the circuits, to correct significant error in the Ninth Circuit's opinion, and to articulate an interpretation of the language of Section 2415 and 2416(c) which better effectuates Congress' intent to place the government on an equal footing with private litigants.

II. This Court should grant review to resolve the conflict among the circuits by clarifying whether state or federal substantive law should provide the rule of decision governing claims assigned to FDIC.

A. The conflict among the circuits.

1. The Ninth Circuit's analysis.

To determine the appropriate statute of limitations to apply in the present case, the assigned breach of fiduciary duty claims must be characterized as being "founded upon a tort" or "founded upon any contract" for purposes of Section 2415. *United States* v. *Neidorf*, 522 F.2d 916, 919 (9th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976). Central to this process

is choosing the body of substantive law to apply in making the determination. [16]

The district court, citing federal case law, held that breach of fiduciary duty claims generally sound in tort. (App. 42) The Ninth Circuit also relied on federal case law to characterize the claims. In so doing it implicitly misconstrued or ignored significant authority from this Court, and is in decided conflict with decisions of other courts of appeals. This Court should accept review in order to clarify the law in this area in several significant respects. [17]

2. The nature of the conflict.

In *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 458-59, 461-62 (1942), this Court held that when FDIC is a party to a case that turns on clear and

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[16] As is clear from the discussion in Section I, *supra.*, petitioners do not dispute that determination of the date a claim "accrues" as that term is used in Section 2415 is a procedural matter which should be governed by a uniform body of federal law. However, the characterization of claims assigned to FDIC by a state bank as either "contract" or "tort" is a substantive issue which should be determined by reference to state law, as the following discussion demonstrates.

[17] Although petitioners argued in the Ninth Circuit that the rule applied by the Oregon courts to characterize breach of fiduciary duty claims as torts merited adoption in this case (Answering Br. of Appellees Lee, et al, pp. 44-45) they never directly raised the choice of law issue in the Ninth Circuit. In the event that this Court determines the issue was not sufficiently preserved below, petitioners urge this Court to exercise its discretion to decide this purely legal question. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).

emphatic federal policies, the substantive issues are federal questions to be decided under federal law. In a concurring opinion expressing his views alone, Justice Jackson went much further, stating that under the predecessor of 12 U.S.C. Section 1819(b)(2), federal substantive law applies in all cases to which FDIC is a party. 315 U.S. at 468.

Based on Justice Jackson's concurrence, numerous courts of appeals have broadly interpreted the statute to mandate the application of federal law whenever FDIC is a party regardless of whether federal policy concerns are implicated in the case. The First Circuit has held, for example, that federal common law must provide the rule of decision in cases where the FDIC is a party, even if the FDIC is successor in interest to a state law cause of action. *Santoni* v. *FDIC*, 677 F.2d 174, 177-78 (1st Cir. 1982); *see also FDIC* v. *Blue Rock Shopping Center*, 766 F.2d 744, 747 (1985); *FDIC* v. *Bank of San Francisco*, 817 F.2d 1395, 1398 (9th Cir. 1987). Although the Ninth Circuit's decision in the present case contains no choice-of-law analysis, it is clear that the court believed that it ought to apply federal common law. [18]

This result carries *D'Oench* too far, and is in marked contract to the well-reasoned opinion of Judge Posner in *FDIC* v. *Braemoor Associates*, 686 F.2d

[18] The Ninth Circuit's decision makes no reference to the Oregon cases that are directly on point and relies primarily on two pre-*Erie* cases applying federal common law, *Hughes* v. *Reed*, 46 F.2d 435, 440-41 (10th Cir. 1931), and *Payne* v. *Ostrus*, 50 F.2d 1039, 1042 (8th Cir. 1931).

550, 554 (7th Cir. 1982), *cert. denied* 461 U.S. 927 (1983), which distinguishes *D'Oench* and holds that state law governs substantive issues when FDIC sues as the assignee of a state-law claim. Applying the analysis articulated by this Court in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), Judge Posner describes a rebuttable presumption that state law should supply the rule of decision when FDIC is suing as the successor in interest to a defunct state bank's cause of action against alleged wrongdoers:

> "[T]he absence of any ready-made federal common law in most areas of law in which it might be applied, and a general reluctance to displace state law without explicit statutory or constitutional direction to do so, support a presumption that state law is adequate and should be adopted by the federal court as the rule of decision."

686 F.2d at 554. *Accord FDIC* v. *Abraham*, 501 F. Supp. 221, 223 (E.D. La. 1980).

Just as *Braemoor Associates* reveals a conflict with other circuits as to the scope of *D'Oench*, it demonstrates a difference with respect to the application of *Kimball Foods*. Other courts of appeals disagree as to the applicability of the *Kimball Foods* analysis to a claim by the FDIC. The Third Circuit has questioned whether that analysis should be applied at all. *FDIC* v. *Blue Rock Shopping Center*, 766 F.2d at 747-48. The First Circuit in *Santoni* v. *FDIC*, 677 F.2d at 177-78, applied federal substantive law without mentioning *Kimball Foods*. The Tenth Circuit, in

contrast, held that state substantive law regarding the elements of fraud should supply the rule of decision in *FDIC* v. *Palermo*, 815 F.2d 1329, 1334 (10th Cir. 1987). It based this conclusion on *Kimball's* tripartite test. Here, the Ninth Circuit made no mention of the precedent at all.

B. Choice of law in characterizing the claims.

1. This Court's decision in D'Oench does not require the displacement of state law when FDIC is suing as the assignee of state law claims.

In *D'Oench*, FDIC sued to recover on a note that had been issued to an insured bank on condition that it would not be called for payment. In response to the maker's defense of lack of consideration, FDIC maintained that the note had been given with the intention of falsely overstating the bank's assets. 315 U.S. at 456. Because the Federal Reserve Act expressed a strong federal policy against intentional over-valuation of bank assets, this Court held that the maker's defense was barred as a matter of federal law. *Id.* at at 461-62.

The majority decision in *D'Oench* did not hold that FDIC's action on the note was a matter of federal common law, nor did the majority opinion ever consider whether the earlier version of 12 U.S.C. Section 1819(b)(2)(A) mandated the application of federal law. *D'Oench* simply holds that federal law applies when federal substantive law is invoked by the FDIC. That is not the case here; FDIC's breach of fiduciary duty claims are grounded in state law. No federal

substantive issues exist and no federal policies are impicated. Like *Braemoor Associates*, this is a case governed exclusively by state substantive law.

2. The Ninth Circuit erred in looking to federal rather than state law for the federal rule of decision in characterizing the claims.

Even assuming that federal law governs all cases and all claims involving FDIC, it is neither necessary nor proper to devise a uniform federal common law rule for each of the myriad substantive issues involved in such cases. The federal common law may dictate application of state law as the rule of decision.

> Whether to adopt state law or to fashion a nationwide federal rule is a matter of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.

United States v. *Kimball Foods, Inc.*, 440 U.S. at 727-28 (quotation and citation omitted).

In *Kimball Foods*, this Court stated that in determining whether an issue controlled by federal law should be adjudicated pursuant to state law principles, courts should consider the necessity for a nationally uniform body of law regarding the federal program, the possibility that specific objectives of the program would be frustrated if such a body of law were not created, and the disruption of commercial relationships predicated on state law which would result from application of a federal rule. *Kimbell Foods*, 440 U.S. at 728-29.

In this case, the Ninth Circuit erred when it chose to apply federal common law in characterizing the claim. First, there is no need for a uniform national law regarding the characterization of a state law breach of fiduciary duty claim brought by FDIC as successor in interest. Undeniably, FDIC brings an action which if brought by the bank would be a state action governed by state statutory and common law. The fact that FDIC pursues the claim by assignment should not alter the character of the claim or the substantive law upon which the claim is based. *FDIC* v. *Braemoor Associates*, 686 F.2d at 554. Second, to use established state law to define a claim for statute of limitations purposes would not frustrate specific federal objectives. There is no federal statute or body of federal case law defining peculiarly federal fiduciary duties of a state bank director. Finally, commercial relationships governed by state law would be adversely affected by a federal rule governing the characterization of the claims in this case, because it would bring inconsistency to actions arising out of the demise of a state bank in that FDIC will have a significantly longer time than potential local plaintiffs to bring such claims.

3. The legislative history of Section 2415 supports the application of state law as the rule of decision on substantive issues in governmental claims.

Choice of law was addressed by the Justice Department during in the enactment of Section 2415:

> A final problem is the choice of law govern-

ing such issues as when a claim accrues. Although it is true that these issues often present novel questions of fact, the general practice concerning these matters is settled and is not generally regarded as in need of change. Substantive issues arising in tort cases involving the Government will usually be governed by the law of the State where the accident occurred. This bill preserves this principle.

Procedural issues in such cases will be governed by the law of the forum. Government contract cases will follow the Federal law that has evolved in these types of cases. There seems to be no good reason for disturbing these arrangements. [19]

Thus, Section 2415 was not intended to alter choice of law principles governing cases involving the federal government.

4. Under Oregon law, these breach of fiduciary duty claims would be characterized as torts.

The Oregon Supreme Court has clearly enunciated the principle to be applied in determining whether a claim sounds in contract or tort for statute of limitations purposes. In *Securities-Intermountain* v. *Sunset Fuel*, 289 Or. 243, 259, 611 P.2d 1158, 1167 (1980), the court held:

If the alleged contract merely incorporates by reference or by implication a general standard of

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[19] *Improvement of Procedures in Claims Settlement and Government Litigation, Hearing on H.R. 13651, H.R. 13652, H.R. 14182 Before Subcomm. No. 2 of the House Committee on the Judiciary*, 89th Cong. 2d Sess. 9.

> skill and care to which the defendant would be bound independent of the contract, and the alleged breach would also be a breach of this noncontractual duty, then [the tort statute of limitations] applies.

This standard was applied to characterize breach of fiduciary duty claims against corporate officers and directors as tort claims in *Sabre Farms, Inc.* v. *Jordan*, 78 Or. App. 323, 327-28, 717 P.2d 156, 159 (1986), based upon the court's determination that the duties of the officers and directors "are binding by reason of the relationships between the parties, independently of contract."

5. Summation.

As Judge Posner observed in *Braemoor Associates*, it is "difficult to see why assignment to FDIC should alter or enlarge" the claims alleged in this case. 686 F.2d at 554. Prior to the assignment, the bank's potential claims were cognizable as tort claims subject to Oregon's two-year statute of limitations. By virtue of the Ninth Circuit's decision, those tort claims have been transformed into contract claims subject to what amounts to a twelve-year statute of limitations. This transformation finds no support in federal law, federal policies, or the decisions of this court.

III. The Ninth Circuit erred in its characterization of the breach of fiduciary duty claims as contract claims under federal common law.

A. The Ninth Circuit's analysis.

Although the Ninth Circuit recognized the neces-

sity for judicial characterization of a claim as tort or contract in order to properly apply the legislative mandate contained in Section 2415, it refused to undertake that task. Citing Ninth Circuit authority for the proposition that if there is a "substantial question" as to which of two conflicting statutes of limitations applies, the court should apply the longer, (App. 11) it determined that there was a substantial question as to whether FDIC's claims sounded in tort or in contract because some courts had determined that similar claims sound in contract and some that they sound in tort. (App. 12-13.)

B. The Ninth Circuit abdicated its judicial role.

It is the role of a court to determine whether a claim sounds in tort or contract for purposes of the statute of limitations:

> Where a statute distinguishes between tort and contract theories and substantial consequences flow from characterization of a case as one or the other, the courts have no right to treat the terms interchangeably.

Blusal Meats, Inc. v. *United States*, 638 F. Supp. 824, 831 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1007 (2nd Cir. 1987). The Ninth Circuit, however, did not conduct any independent analysis of the nature of FDIC's claims. It simply determined that *other* courts had held that similar claims were or might be contractual. This determination was not based on the court's view of the law; it merely accepted other courts' views as reasonable, without considering whether they might

be wrong. In so doing, it ignored Congress' intent in adopting a six-year limitations period for contract claims and a three-year limitations period for torts. Congress expected the courts to decide which claims fit into each of the two categories. The Ninth Circuit failed to fulfill the role given it by Congress.

C. Under federal common law, claims for breach of fiduciary duty should sound in tort rather than in contract.

If the Ninth Circuit had independently examined FDIC's claims, it would have held that they were in the nature of tort rather than contract. A corporate fiduciary is bound to act honestly and in good faith based upon principles of equity, not because of an implicit agreement between the fiduciary and beneficiary. *See* G. Bogert, *Trusts and Trustees* Section 481 (rev. 2d ed. 1978); *Carter Equipment* v. *John Deere Indus. Equipment*, 681 F.2d 386, 390-91 (5th Cir. 1982). The Restatement (Second) of Torts Section 874 (1977) provides for tort liability of all fiduciaries. Comment b emphasizes that regardless of the type of fiduciary involved, "the liability is not dependent solely upon a agreement or contractual relation between the fiduciary and the beneficiary but results from the relation."

It is the prevailing view that in an action for breach of duty where an alleged contract imposes no separate duty other than that imposed by common law, the action is properly characterized as one in tort. *See, e.g., Sugarman* v. *Sugarman*, 797 F.2d 3, 14 (1st Cir. 1986); *FDIC* v. *Citizens Bank & Trust*

Co., 592 F.2d 364, 369 (7th Cir.), *cert. denied* 444 U.S. 829 (1979); *C. E. Jacobs* v. *FDIC*, 638 F. Supp. 214, 215 (E. D. Tenn. 1986); *Union Bank of Switzerland* v. *HS Equities, Inc.*, 423 F. Supp. 927, 929 (S.D.N.Y. 1976); *Securities-Intermountain* v. *Sunset Fuel*, 289 Or. at 259, 611 P.2d at 1167; *Mack* v. *American Fletcher Nat'l Bank*, 510 N.E.2d 725, 738-39 (Ind. App. 1987) (noting "the trend . . . to declare that a breach of fiduciary duty is a tort") and authority cited therein.

The substance of FDIC's claim here is that petitioners owed the banks "a duty of reasonable prudence, care and oversight in the discharge of their responsibilities" which is "implicit in the office of bank director." (App. 121-22) Regardless of whether they took an oath or otherwise pledged in writing or orally that they would fulfill their duties to the banks faithfully, the better rule is that they should be liable, if at all, only in tort for their alleged breach of duty.

CONCLUSION

There are a substantial number of cases now pending in which the lower courts may well be called upon to decide the exact issues presented by this case. Those courts urgently need the guidance of this Court, given the pronounced split in the decisions of the circuit and district courts. This Court should grant this petition to resolve the conflict among the circuit courts, to enforce the expressed intentions of Congress, and to clarify choice of law principles in litigation involving the FDIC.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, *Plaintiff-Appellant,* v. FORMER OFFICERS AND DIRECTORS OF METROPOLITAN BANK, DANIEL R. ADAMS, W. TODD COFFELT, STEVEN HUNGERFORD, FRANK LEE AND CHARLES A. DALE; FORMER OFFICERS AND DIRECTORS OF WILLAMETTE FALLS STATE BANK, GENE A. RICKERT, LARRY A. SCHOENBORN, P. DEAN NICHOLS, JOHN MOLENDYK, JOYCE EVANS, K. PETER NORRIE, GARY L. DENNISON, LEWIS JOHNSON and IRVING W. POTTER; FORMER OFFICERS AND DIRECTORS OF INDEPENDENT BANK OF SANDY, C. DALE BROOKENS, LESTER HARDY, JOHN ROWELL and THOMAS WOLF, *Defendants-Appellees.*	No. 88-3638 D.C. No. CV-87-206-PA OPINION

Appeal from the United States
District Court
for the District of Oregon
Owen M. Panner, Chief
District Judge, Presiding

Argued and Submitted
June 27, 1989--Portland, Oregon

Filed September 13, 1989

Before: Arthur L. Alarcon, Melvin
Brunetti and Diarmuid F.
O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

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OPINION

O'SCANNLAIN, Circuit Judge:

The Federal Deposit Insurance Corporation ("FDIC") appeals the district court's grant of summary judgment in favor of the former officers and directors of the United Bank of Oregon, a failed bank consisting of the merged assets of three predecessor banks. The district court granted summary judgment for defendants, ruling that claims of breach of fiduciary and statutory duties were barred by the statute of limitations. We reverse.

A.

In January 1983, three ailing Oregon banks, Metropolitan Bank ("Metropolitan"), Willamette Falls State Bank ("Willamette Falls"), and Independent Bank of Sandy ("IBS") merged to form the

United Bank of Oregon ("UBO"). The new fourteen-member UBO board of directors was composed of directors from the three constituent banks: eight from Metropolitan, three from Willamette Falls, and three from IBS. On March 2, 1984, UBO was declared insolvent, and the Federal Deposit Insurance Corporation was appointed receiver of the bank. The FDIC in its capacity as receiver assigned certain assets of UBO to the FDIC in its corporate capacity, including the claims of the constituent banks against their former officers and directors and all claims of UBO against its former officers and directors.

On February 27, 1987, FDIC filed a complaint in federal district court, alleging that twenty former officers and

directors of the constituent banks had also been directors of UBO. FDIC claims against these officers and directors included breach of fiduciary duty, negligence, and statutory violations and claims for indemnity. These claims were based on the alleged mismanagement of the loan portfolios of the constituent banks.

Eight of the defendants moved for summary judgment, contending that all claims were barred by the statute of limitations. The district court granted summary judgment, holding (1) FDIC's claims sounded in tort, rather than contract, so that the relevant statute of limitations was the three-year period applicable to torts; (2) the right of action accrued when the loans were made, regardless of whether the government

possessed the claims at that time; and (3) the statute of limitations was not tolled due to control or domination of the banks by the defendants. The district court concluded that the applicable statute of limitations, 28 U.S.C. § 2415(b), barred the action.

FDIC filed a motion for reconsideration, apparently based on Fed. R. Civ. P. 60(b)(6). In this motion FDIC argued that the district court erred in applying federal law to its claims; that a six-year statute of limitations should have been used; and that discovery should have been permitted. All three arguments were rejected by the district court. The district court also granted summary judgment for two more defendants. To expedite the appeal, FDIC moved for, and the district court granted, judgment in

favor of all defendants in this action. FDIC timely appealed and argues that the district court erred (1) in its characterization of FDIC's claims as sounding in tort rather than in contract; (2) in holding that the statute of limitation began to run before FDIC acquired its claims; and (3) in granting summary judgment on the issue of adverse domination by the defendants.

B.

The applicable statutes of limitations are found in 28 U.S.C. § 2415. Subsection (a) provides for a six-year time limitation within which any action for money damages may be brought by an agency of the United States "which is founded upon any contract express or implied in law or fact. . . ." 28 U.S.C. § 2415(a). Subsection (b) provides a

three-year time limit within which any action for money damages may be brought by an agency of the United States "which is founded upon a tort." 28 U.S.C. § 2415(b). These statutes of limitations apply to FDIC as an agency of the United States. *See FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986); *FDIC v. Petersen*, 770 F.2d 141, 143 (10th Cir. 1985).

[1] On this appeal, FDIC contends that its claims for breach of fiduciary duties to the banks outlined in its complaint sound in contract for the purposes of determining the relevant

statute of limitations.[1] FDIC argues that its claims are founded both on express contract, based on the statutory oath required of defendants, and on implied contract from each defendant undertaking to serve as officer or director of a federally insured bank. This characterization of FDIC's claims would allow it to benefit from the six-year statute applicable to contracts claims.

Congress, in establishing a statute of limitations for government claims, assigned time periods according to the common law division of actions. *United*

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[1] The district court determined the applicable statutes of limitations periods for three of appellant's claims. FDIC contests on appeal only the limitations period for its breach of fiduciary duty claims. Accordingly, we express no opinion as to the proper limitations periods for appellant's other claims.

States v. Limbs, 524 F.2d 799, 801 (9th Cir. 1975). To determine the relevant statute of limitations under section 2415, therefore, a court generally must characterize the action. *United States v. Neidorf*, 522 F.2d 916, 919 (9th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).

[2] This circuit has held, however, that when there is a "substantial question" which of two conflicting statutes of limitations to apply, the court should apply the longer. *Guam Scottish Rite Bodies v. Flores*, 486 F.2d 748, 750 (9th Cir. 1931) ("if substantial doubt exists [as to how to characterize an action], the longer, rather than the shorter period of limitations is to be preferred"); *Hughes v. Reed*, 46 F.2d 435, 440 (10th Cir. 1931) ("Where doubt exists

as to the nature of the action, courts lean toward the application of the longer period of limitations").

[3] Was there a substantial question as to whether FDIC's claims sounded in tort or in contract? We conclude there was. The fact that several courts have determined that an action for breach of fiduciary duties sounds in contract, rather than in tort suggests that there is a substantial question as to the nature of the case. *See Payne*, 50 F.2d at 1042; *Hughes*, 46 F.2d at 440-41; *FSLIC v. Aetna Cas. & Sur. Co.*, 701 F. Supp. 1357, 1360 (E.D. Tenn. 1988). Indeed, at least one court has stated that a claim for breach of fiduciary duty may be characterized as either a contract or a tort action. *See International Surplus Lines Ins. Co. v. Marsh & McLennan, Inc.*,

838 F.2d 124, 128-29 (4th Cir. 1988) (analyzing a breach of fiduciary duty claim for statute of limitations purposes as both a tort and a contract claim). Since there is a substantial question whether FDIC's claims for breach of fiduciary duty are properly characterized as sounding in tort or in contract, we conclude that the six-year statute of limitations governs.

Appellees assert that several arguments made by FDIC before this court were not raised in the district court and thus may not be raised on appeal. Appellees claim (1) that FDIC failed to assert before the district court that its claims for breach of fiduciary duty sounded in contract; (2) that FDIC failed to claim that the oaths of office constituted an express contract; and

(3) that FDIC failed to characterize its claims for breach of fiduciary duty as "contracts implied in law" and is thus foreclosed from making this argument on appeal.

We reject these claims. The district court explicitly ruled on the issue whether the claims for breach of fiduciary duty could be characterized as contractual. Although the district court opinion does not discuss the point, FDIC's complaint specifically refers to the oath of office taken by the officers and directors in connection with the fiduciary duties of the officers and directors. Finally, even though FDIC failed to use the technically correct legal term to characterize its implied contract claim, the context of the district court opinion makes it clear

that FDIC's claim involved a contract implied in law, rather than one implied in fact.

C.

When did the causes of action accrue? Because, as an analytical matter, the claims could be deemed to accrue either when the faulty lending practices occurred or when the FDIC acquired the claims by assignment.,[2] it can be argued that some of the claims accrued outside the six-year statute of limitations that we have found applicable to the breach of fiduciary duty claims.

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[2] Appellee also argues that the claims are barred because UBO assigned all claims on February 17, 1984. However, a reading of the documents allegedly assigning the claims as of such date shows that it was merely a request for financial assistance, which was denied by the FDIC. Further, the argument must be rejected in light of our conclusion that the six-year contract statute of limitations applies.

[4] Courts are divided on the issue of when the statute of limitations begins to run on claims acquired by the FDIC. *Compare FDIC v. Hinkson*, 848 F.2d 432, 435 (3d Cir. 1988) (dicta) (accrual begins when government acquires claim); *FDIC v. Cardona*, 723 F.2d 132, 134 (1st Cir. 1983) (same) (dicta); *FDIC v. Carlson*, 698 F. Supp. 178, 180 (D. Minn. 1988) (same); *FSLIC v. Burdette*, 696 F. Supp. 1196, 1200 (E.D. Tenn. 1988) (same); *FDIC v. Hudson*, 673 F. Supp. 1039, 1041 (D. Kan. 1987) (same); *FDIC v. Buttram*, 590 F. Supp. 251, 254 (N.D. Ala. 1984 (same) *with FDIC v. Petersen*, 770 F.2d 141, 143 (10th Cir. 1985) (stating that the FDIC's cause of action to enforce a guaranty accrues and the statute of limitations begins to run on the date the underlying note matures in

the hands of the private assignor); *FDIC v. Greenwood*, 701 F. Supp. 691, 694 (C.D. Ill. 1988) (FDIC's cause of action accrued when the defendants first committed their allegedly negligent acts, not when the FDIC acquired the assets of the failed bank); *United States v. Cardinal*, 452 F. Supp. 542, 544 (D. Vt. 1978) (statute of limitations begins to run when the claim can first be sued on, even if the government has not yet acquired claim).

Given this split of authority and lack of Ninth Circuit case law, we will examine statutory language, principles of statutory construction, and policy to interpret the relevant statutes. FDIC notes that section 2415 expressly subjects the statutes of limitations to

the provisions of section 2416.[3]

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[3] Relevant portions of section 2415 provide:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . .
>
> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues; . . . .

Relevant portions of section 2416 provide:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which--
>
> * * *
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; . . . .

Section 2416(c) provides that in determining whether an action is barred by section 2415, periods during which material facts were not known and could not reasonably have been known "by an official of the United States charged with the responsibility to act in the circumstance" must be excluded. FDIC argues that until it was appointed receiver for UBO it had no authority to enforce the bank's claims, and that therefore the statute of limitations cannot begin to run until it acquired the claims upon its appointment as receiver.

Appellees urge, however, that FDIC failed to argue before the district court that section 2416 limited section 2415, and therefore this court should refuse to consider this argument on appeal. We

find that no express citation to section 2416 was necessary where 2415 explicitly incorporates the provisions of 2416. In addition, where, as here, the question not raised during summary judgment proceedings is a purely legal one, this court has discretion to consider the issue and thus may take section 2416 into account in interpreting section 2415. *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980).

The policy arguments are fairly evenly balanced and do not weigh strongly in favor of either side in this case. Interpreting the statute of limitations as beginning to run when FDIC acquires the claims promotes uniformity in the sense that it would give FDIC a uniform time to bring suit on all claims. However, determining that the statute of

limitations begins to run when the underlying wrongdoing occurs also promotes uniformity, as all potential defendants would then be subject to a uniform statute of limitations that would not be lengthened if FDIC later acquired the claims. Other countervailing interests also exist. On appellant's side is the interest in allowing the FDIC sufficient time to investigate claims. On appellees' side are the interests in allowing potential defendants predictable repose and in encouraging FDIC to bring claims promptly.

[5] To the extent that a statute is ambiguous in assigning a limitations period for a claim, we will interpret it in a light most favorable to the government. The Supreme Court has stated that "[s]tatutes of limitation sought to

be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924). We find that the application of this principle is particularly appropriate in this case because prior to the enactment of section 2415 there was no time limitation on the government's ability to bring suit, unless a particular federal statute provided a statute of limitations.

[6] In sum, we find that the statute of limitations begins running upon acquisition of the claim by the federal

government upon FDIC's appointment as receiver.[4]

REVERSED and REMANDED.

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[4] Appellees also argue that FDIC's claims against defendants Lee and Dale were time barred under Oregon law when FDIC was assigned them, so that they were not revived when the assignment was given. It is settled law that state limitations statutes are relevant in determining a claim's viability at the time the federal agency acquires the claim. If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 142 (1938) ("[T]he proof demonstrates that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid.")

The question is thus whether the claims against these particular defendants were still viable under Oregon law. We conclude that they were. Or. Rev. Stat. 708.470 provides no statute of limitations, and thus FDIC's claims are presumptively subject to the six-year limitation period applicable to actions based on liabilities created by statute. Or. Rev. Stat. 12.080(2). Thus, all claims arising within the six-year limitation period were viable at the time of assumption by FDIC.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Appellant, v. FORMER OFFICERS AND DIRECTORS OF METORPOLITAN BANK, Daniel R. Abrams, W. Todd Coffelt, Steven Hungerford, Frank Lee and Charles A. Dale; FORMER OFFICERS AND DIRECTORS OF WILLAMETTE FALLS STATE BANK, Gene A. Rickert, Larry A. Schoenborn, P. Dean Nichols, John Molendyk, Joyce Evans, K. Peter Norrie, Gary L. Dennison, Lewis Johnson and Irving W. Potter; FORMER OFFICERS AND DIRECTORS OF INDEPENDENT BANK OF SANDY, C. Dale Brookens, Lester Hardy, John Rowell and Thomas Wolf, Defendants-Appellees.	No. 88-3638 DC No. CV-87-206-PA ORDER

Before: ALARCON, BRUNETTI, and O'SCANNLAIN, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FEDERAL DEPOSIT INSURANCE CORP.,	)	
Plaintiff,	)	Civil No. 87-206-PA
v.	)	OPINION
FORMER OFFICERS AND DIRECTORS OF METROPOLITAN BANK: DANIEL R. ADAMS, W. TODD COFFELT, STEVEN HUNGERFORD, FRANK LEE, and CHARLES A. DALE,	)	
FORMER OFFICERS AND DIRECTORS OF WILLAMETTE FALLS STATE BANK: GENE A. RICKERT, LARRY A. SCHOENBORN, P. DEAN NICHOLS, JOHN MOLENDYK, JOYCE EVANS, K. PETER NORRIE, GARY L. DENNISON, LEWIS JOHNSON, IRVING W. POTTER, GEORGE HAMMOND,	)	
FORMER OFFICERS AND DIRECTORS OF INDEPENDENT BANK OF SANDY: C. DALE BROOKENS, JOSEPH CEJKA, LESTER HARDY, JOHN ROWELL, and THOMAS WOLF as a director and as	)	

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PANNER, J.

The Federal Deposit Insurance Corporation (FDIC) brings this action against twenty former officers and directors of three banks which merged into one bank. The merged bank was declared insolvent. FDIC paid on its obligations as insurer of the depositors, and was appointed receiver of the failed bank. Eight of the defendants have moved for summary judgment on the grounds that the complaint is barred by the statute of limitations. I grant the motions.

BACKGROUND OF THE CASE

In January 1983, three ailing banks, Metropolitan Bank (Metropolitan), Willamette Falls State Bank (Willamette Falls) and Independent Bank of Sandy (IBS) merged to become the United Bank of Oregon (UBO). The new fourteen-member UBO

board of directors was made up entirely of directors of the three banks: eight from Metropolitan, three from IBS, and three from Willamette Falls. UBO was declared insolvent by the Oregon Superintendent of Banks on March 2, 1984. FDIC was the insurer of the depositors. FDIC was also appointed receiver of the bank as provided for by ORS 711.465(1) and 12 U.S.C. § 1821. These two roles are separate and distinct. Federal Deposit Ins. Corp. v. Hatmaker, 756 F.2d 34, 36 n.2 (6th Cir. 1985). As insurer, FDIC paid out some $11 million to the depositors. FDIC asserts its claims in the dual capacity as assignee of the receiver and subrogee of the insurer. On February 27, 1987, FDIC filed a 172-page complaint. None of the defendants have answered, but rather

several have filed these motions for summary judgment. No discovery has yet occurred. The facts are essentially identical for all defendants except for the length of their involvement with one or more of the banks. Some resigned as early as August 1981, well before the merger took place. Several resigned on December 31, 1982, when the three predecessor banks closed immediately prior to the merger. Others resigned at various times up to the closing of UBO in March 1984. Each of them contends that the statute of limitation bars this suit. They resist discovery and point out that the records of the banks have been within the sole control of FDIC since at least March 1984 and yet FDIC fails to respond to their summary

judgment motions with facts negating their position.

STANDARDS

The court may grant summary judgment under Fed. R. Civ. P. 56(c) if it finds no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. The moving party must show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 2548, 2553 (1986). All reasonable doubts as to the existence of a genuine issue of material fact should be resolved against the moving party. Hector v. Weins, 533 P.2d 429, 432 (9th Cir. 1976). The inferences drawn from the facts must be viewed in a light most favorable to the nonmoving party. United States v. Diebold, 369 U.S. 654, 655 (1962).

"[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., ____ U.S. ____, 106 S. Ct. 2505, 2510 (1986). If the moving party satisfies the initial burden, then the burden shifts to the opponent to come forward with specific facts showing that a genuine material fact remains in the case. Neely v. St. Paul Fire & Marine Insurance Co., 584 F.2d 341, 344 (9th Cir. 1978). If the adverse party does not respond, summary judgment, if appropriate, shall be entered against him Fed. R. Civ. P. 56(e).

Summary judgment may be appropriate where the basis is a statute of

limitations defense, even though there has been no discovery. Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289 (8th Cir. 1975).

DISCUSSION

In general, federal law, not state law, controls the rights of the FDIC. D'oench D. & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 456 (1942). This is true unless the claims expired under state law before their assignment to the FDIC.[1] Federal Deposit Ins. Corp. v. Cardona, 723 F.2d 132, 143 (1st Cir. 1983). The relevant statute of limitations is 28 U.S.C. § 2415, which

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[1] Defendant Lee contends that the cause of action accrued prior to February 17, 1982, and therefore ORS 12.110(1) ran before the assignment to FDIC on February 17, 1984. Because I find that the limitation period expired under federal law, I need not reach this issue.

provides for a three year limitation period for torts and a six year limitation period for contracts. Congress assigned these periods according to the common law division of actions, which sound in tort, contract or quasi-contract. United States v. Limbs, 524 P.2d 799, 801 (1975). FDIC contends that the complaint states four[2] causes of action: indemnity, statutory and regulatory violations, breach of fiduciary duty, and negligence.

1. Indemnity.

Plaintiff contends that defendants are liable in indemnity and therefore the six year statute of limitations under an implied contract applies. They contend

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2 The complaint also alleges legal malpractice, which relates only to one of the defendants not a party to these motions.

that FDIC, as insurer, has discharged a legal obligation for which the defendants were also liable and that the defendants should pay. Inherent in this argument is the assumption that the depositors of the banks have a direct claim against the former officers or directors of the banks, and that FDIC acquired those rights by subrogation. However, depositors do not have a direct cause of action against former officers and directors unless they suffered a wrong distinct to them and not common to all, or unless the receiver declines to sue. Adato v. Kagan, 599 F.2d 1111, 1117 (2d Cir. 1979). Claims against former directors are an asset of the bank. Contrary to plaintiff's assertion, ORS 711.470 and 12 U.S.C. § 1821(g) provide subrogation rights to FDIC as insurer

against the closed bank, not against its former directors. Plaintiff does not have a claim under this theory or the benefit of the six year period of limitations.

2. Statutory And Regulatory Violations.

Plaintiff alleges that defendants violated federal statutes and regulations which prohibit loans to officers and directors unless they are made on the same terms as usually prevail, and which, for amounts over $25,000, require prior approval of the board without the interested party's participation. Plaintiff contends that these claims are subject to the six year contract limitation of ORS 12.080(2) and 28 U.S.C. § 2415(a). Plaintiff also alleges violation of ORS 708.470, which provides

in part: "The liability for the loan continues until the loan, with interest, is paid in full without loss to the institution." Plaintiff contends that no statute of limitations applies to ORS 708.470.

As noted, only federal law controls the rights of the FDIC. D'oench, D. & Co. v. Federal Deposit Ins. Corp., 315 U.S. at 456. In addition, the limitation period under section 2415 is not altered because the act also violates a statute or regulation. United States v. Limbs, 524 F.2d at 801. I must determine whether the underlying cause of action sounds in common law tort, contract or quasi-contract.

This case is unlike United States v. Niedorf, 522 F.2d 916 (9th Cir. 1975), in which the government sued as a creditor

against shareholders of a corporation for recovery of distributions to them which had rendered the corporation insolvent. There the court characterized the liability of the transferee of a fraudulent conveyance and the liability of a shareholder to a creditor as one based on quasi-contract, and on that basis applied the six year statute of limitations. More on point is McNair v. Burt, 68 F.2d 814 (5th Cir. 1934), in which the receiver of a bank sued the directors for improvident and excessive loans. Even though the bank officers in that case had taken a statutorily prescribed oath of office, the court rejected the contention that a contract statute of limitation should apply. Id. at 816. The court characterized the claim as one of common law negligence. I

find that the underlying claim of the FDIC is properly characterized as a common law tort rather than contract or quasi-contract. The applicable limitation period is three years. 28 U.S.C. § 2415(b).

3. Breach Of Fiduciary Duty.

Plaintiff asserts that the defendants breached their fiduciary duty toward the bank, which requires that their acts benefit the bank and not themselves. They contend that under some situations, the fiduciary duty is considered a contract implied at law, requiring the six year limitation period. In Hughes v. Reed, 46 F.2d 435 (10th Cir. 1931), the receiver of a bank sued its former directors to recover losses alleged to have been incurred by the bank in violation of their duties as

directors. The court stated that directors assume the duty to direct the affairs of the bank honestly and diligently. In Hughes this relationship was "fortified" by a statutorily prescribed oath of office. The court applied the contract statute of limitations. Id. at 441. In this case, however, there is no oath of office, no writing indicating mutual consent of the parties, and no special relationship as in United States v. Douglas, 626 F. Supp. 621 (E.D. Va. 1985), where the court found that government employees owe a fiduciary duty to the government which arises out of a contract implied at law. In this case the fiduciary duty of the former officers and directors sounds in common law tort. The applicable limitation period is three years. 28

U.S.C. § 2415(b).

4. Negligence.

If defendants breached their duty of ordinary diligence or failed to exercise reasonable control over the making of loans, the applicable limitation is three years "after the right of action first accrues" as provided in 28 U.S.C. § 2415(b). Plaintiff contends that the right of action accrued when it took receivership of the UBO in March 1984. The cases are divided on whether the right of action accrues when FDIC first took receivership or when the claim first became actionable regardless of when the government acquired the claim. In Federal Deposit Ins. Corp. v. Buttram, 590 F. Supp. 251, 254 (N.D. Ala. 1984), the court held that the statute of limitations could not have begun running

prior to the time FDIC was appointed receiver. In that case, however, the directors were still in control of the business and the court stated that even if FDIC was aware of wrongdoing by the officers of the bank, it had no legal authority to bring suit on behalf of the bank prior to its appointment as receiver against directors who still were in control. Federal Savings and Loan Ins. Corp. v. Williams, 599 F. Supp. 1184, 1193 (D. Md. 1984), held similarly, without discussion. Federal Deposit Ins. Corp. v. Cardona, 723 F.2d 132, 134 (1st Cir. 1983), also held that the cause of action accrued with the FDIC's appointment as receiver, but apparently because the Puerto Rico statute of limitations would have allowed an action beyond the federal statute, and the court

stated that the government should not have fewer rights under federal law than under state law. The most thorough discussion of this issue occurred in United States v. Cardinal, 452 F. Supp. 542 (D. Vt. 1978), in which the court examined legislative history and analogous statutes. Cardinal concludes that the cause of action accrues when the claim first could be sued upon, regardless of whether the government possessed the claim at that time. This conclusion eliminates uncertainty about how long defendants may be subject to suit and makes the government more nearly equal to private litigants. I follow the better rule as held in Cardinal.

Under federal law the action accrued when the money was loaned. Corsicana National Bank v. Johnson, 251 U.S. 68, 86 (1919).[3] Even though the amount of damage may not be known, the damage as well as the injury is considered complete, and it became the duty of the officers and directors to restore the money to the bank, when they knew or should have known of the wrongdoing. Id.; Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir. 1984). Plaintiff does not allege that the defendants concealed the alleged wrongdoing or conspired among themselves

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[3] Although as plaintiff points out Oregon law may be different, cf. U.S. National Bank v. Davies, 274 Or. 663, 666, 548 P.2d 966 (1976), federal law controls the rights of the FDIC. D'oench D. & Co. v. Federal Deposit Ins. Corp., 315 U.S. at 456.

or with nondefendant officers or directors to keep it secret. The bank and its officers and directors must be charged with knowledge of what appears on its books. Curtis v. Connly, 257 U.S. 260, 262-63 (1921). All of the alleged wrongdoing in this case occurred prior to the merger of the three banks into the UBO. Consequently, plaintiff's cause of action accrued at least by December 31, 1983, when the three predecessor banks merged.

Plaintiff seeks to avoid this consequence by contending that the statute of limitations is tolled for the length of time that the defendants controlled or dominated the banks, because the directors could hardly be expected to sue themselves. Federal Deposit Ins. Corp. v. Bird, 516 F. Supp.

647, 651 (D. P.R. 1981). The leading Ninth Circuit case states:

> A plaintiff who seeks to toll the statute because the corporation was dominated must show "full, complete and exclusive control in the directors or officers charged." International Railways of Central America v. United Fruit Co., 373 F.2d 408, 414 (2d Cir. 1967). The test is that "once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." Id.

Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d at 879 (Solomon, J.). In International Railways, the circuit recognized that the odds were against a reconstituted board of directors authorizing suit. Nevertheless, the circuit affirmed the district court's grant of summary judgment because the plaintiff had not borne its burden of

showing that the board would not have authorized suit. International Railways of Central America v. United Fruit Co., 373 P.2d at 414.

The fourteen-member UBO board was made up entirely of directors of the three banks: eight from Metropolitan, three from IBS, and three from Willamette Falls. Eight of the original fourteen UBO directors are defendants. Plaintiff contends that "it simply ignores human nature to expect these directors to sue" former directors, since suit of former directors would implicate many of the directors who were still on the board of UBO when FDIC took receivership.

This argument falls far short of a showing that either the defendants dominated the board or that the culpable defendants concealed relevant facts from

the other directors. On the contrary, defendants present evidence that at least by the time of the merger, the directors were familiar with critical reports made by FDIC in its insurer oversight capacity. They also present evidence of strong and experienced directors that joined the Metropolitan and UBO boards. The statute is not tolled beyond December 31, 1983. Plaintiff filed this action on February 27, 1987. It failed to initiate suit within the three year limitation period of 28 U.S.C. § 2415(b).

CONCLUSION

I grant the motions for summary judgment filed by defendants Norrie, Johnson, Hungerford, Rowell, Schoenborn, Molendyk, Evans, Lee, and Adams because, viewed in a light most favorable to plaintiff, there is no genuine issue of

material fact and defendants are entitled to judgment as a matter of law.

DATED this 31 day of July, 1987.

/s/
Owen M. Panner
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FEDERAL DEPOSIT INSURANCE CORP.,	)	
Plaintiff,	)	Civil No. 87-206-PA
v.	)	OPINION
FORMER OFFICERS AND DIRECTORS OF METROPOLITAN BANK: DANIEL R. ADAMS, W. TODD COFFELT, STEVEN HUNGERFORD, FRANK LEE, and CHARLES A. DALE,	)	
FORMER OFFICERS AND DIRECTORS OF WILLAMETTE FALLS STATE BANK: GENE A. RICKERT, LARRY A. SCHOENBORN, P. DEAN NICHOLS, JOHN MOLENDYK, JOYCE EVANS, K. PETER NORRIE, GARY L. DENNISON, LEWIS JOHNSON, IRVING W. POTTER, GEORGE HAMMOND,	)	
FORMER OFFICERS AND DIRECTORS OF INDEPENDENT BANK OF SANDY: C. DALE BROOKENS, JOSEPH CEJKA, LESTER HARDY, JOHN ROWELL, and THOMAS WOLF as a director and as	)	

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PANNER, J.

On July 31, 1987, I granted defendants' motions for summary judgment and held that the applicable statutes of limitation barred this action by plaintiff Federal Deposit Insurance Corp. (FDIC). Subsequently FDIC moved for reconsideration of that decision. I deny the motion.

BACKGROUND

The facts of this case are more fully set forth in the July 31 opinion. A brief rendition follows. FDIC brought this action against twenty former officers and directors of three banks which merged into one bank. The merged bank was declared insolvent. FDIC paid on its obligations as insurer of the depositors, and was appointed receiver of the failed bank. FDIC asserts its claims

in the dual capacity as assignee of the receiver and subrogee of the insurer. It asserted that defendants were liable under four theories: indemnity, statutory and regulatory violations, breach of fiduciary duty, and negligence. Eight of the defendants moved for summary judgment. I held that FDIC does not have a claim in indemnity, that the underlying claim sounded in tort, that the applicable limitation period was three years under 28 U.S.C. § 2415(b), that the cause of action accrued when the claim first could be sued upon regardless of whether the government possessed the claim at that time, United States v. Cardinal, 452 F. Supp. 542 (D. Vt. 1978), and that the limitations period was not tolled because defendants did not dominate the boards of directors

of the banks. Mosesian v. Peat, Marwick, Mitchell & Co., 727 P.2d 873 (9th Cir.), cert. denied, 469 U.S. 932 (1984). I also denied discovery. FDIC now argues that I erred in applying federal law to its claims; that I erred in failing to apply a six-year statute of limitations, and that I should have allowed discovery.

STANDARD

Plaintiff's motion for reconsideration appears to be based on Fed. R. Civ. P. 60(b)(6), which provides relief from a judgment or order for "any . . . reason justifying relief."

> While the language of either [Rule 60(b)(5) or (6)] is broad, neither presents the court with a "standardless residual discretionary power to set aside judgments . . . ." Instead it is settled that such relief is extraordinary and may be granted only upon a showing of

> "exceptional circumstances." Thus a party seeking such relief must bear a heavy burden of showing circumstances so changed that "dangers, once substantial, have become attenuated to a shadow," and that, absent such relief an "extreme" and "unexpected" hardship will result. We think a healthy respect for the finality of judgments demands no less.

Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977) (citations omitted).

A motion for reconsideration should not be the occasion to tender new legal theories for the first time, but rather should serve to correct manifest errors of law or fact or to present newly discovered evidence. Keene Corp. v. International Fidelity Ins. Co., 561 F. Supp. 656, 666 (N.D. Ill. 1982), aff'd, 735 F.2d 1367, 736 F.2d 388 (7th Cir. 1984). It is within the court's

discretion whether to consider new arguments. Schanen v. United States Dep't of Justice, 762 F.2d 805 (9th Cir. 1985), reaffirmed as modified, 798 F.2d 348 (9th Cir. 1986).

DISCUSSION

In my July 31 opinion, I held that federal law applies to the case, citing D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942). Congress has provided that FDIC has the power:

> To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States . . . . except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the

> rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States.

12 U.S.C. § 1819 Fourth. FDIC argues that state law should apply, citing Federal Deposit Ins. Corp. v. Braemoor Assocs., 686 F.2d 550 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983). The Braemoor court noted that state law may be adopted as the rule of decision in "the absence of any ready-made federal common law." Id. at 554. Unless giving content to the federal law to be applied offers difficulty, which is not true for this case, federal law applies. Federal Deposit Ins. Corp. v. Bird, 516 F. Supp. 647 (D.P.R. 1981). Here, FDIC as receiver assigned its claim to FDIC as corporation. Federal statutes of

limitation are applicable when FDIC acquired its claim by assignment. Id. at 650. FDIC'S capacity as corporate purchaser does not change merely because it is also a receiver. Federal Deposit Ins. Corp. v. Ashley, 585 F.2d 157, 160 (6th Cir. 1978).

FDIC also contends that it is subrogee of the bank's depositors, and that state law should be applied. 12 U.S.C. § 1821(g). However, it is not entitled to indemnity because depositors do not have a direct cause of action against former officers and directors unless they suffered a wrong distinct to them and not common to all. Adato v. Kagan, 599 F.2d 1111, 1117 (2d Cir. 1979).

FDIC also contends that state law should determine the time for accrual of

claims because it disagrees with the rule of United States v. Cardinal, 452 F. Supp. at 542. In the July 31 opinion I carefully considered all the applicable law, including legislative history and public policy, and concluded that Cardinal stated the better rule.

FDIC argues that it should be allowed discovery, but of. s no new evidence or reasons. As noted in the opinion, summary judgment may be appropriate even when there has been no discovery, especially in a case such as this where FDIC has had sole control of the banks' records since at least March 1984.

FDIC also contends that a six-year contract limitation period must apply when federal statutes or regulations are violated, citing United States v. Dae Rim

Fishery Co., 794 F.2d 1392 (9th Cir. 1986). In that case the Ninth Circuit held that the statute imposed a quasi-contractual duty to reimburse the government for an oil spill cleanup. The underlying facts of each case must be characterized as common law tort, contract or quasi-contract for purposes of the statute of limitations. United States v. Limbs, 524 F.2d 799 (1975). The duty of the directors towards bank shareholders and depositors sounds in common law tort. It is not automatically transformed into a contractual relationship by a statute. For the same reasons, the claim for breach of fiduciary duty sounds in tort even if the directors were required to take an oath of office under state law. This is simply not a case where a writing

indicates mutual consent of the parties, nor does a special relationship exist which takes this case out of the realm of common law tort.

CONCLUSION

FDIC merely reiterates its prior arguments. It offers no new evidence or any good reason in law or fact to alter my July 31 opinion. The motion for reconsideration is denied.

DATED this 24 day of November, 1987.

/s/
Owen M. Panner
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FEDERAL DEPOSIT INSURANCE CORP.,	)	
Plaintiff,	)	Civil No. 87-206 PA
v.	)	
FORMER OFFICERS AND DIRECTORS OF METROPOLITAN BANK: DANIEL R. ADAMS, W. TODD COFFELT, STEVEN HUNGERFORD, FRANK LEE, and CHARLES A. DALE,	)	

FORMER OFFICERS AND DIRECTORS OF WILLAMETTE FALLS STATE BANK: GENE A. RICKERT, LARRY A. SCHOENBORN, P. DEAN NICHOLS, JOHN MOLENDYK, JOYCE EVANS, K. PETER NORRIE, GARY L. DENNISON, LEWIS JOHNSON, IRVING W. POTTER,	)	FIRST AMENDED COMPLAINT (Negligence, Breach of Fiduciary Duty, Violation of Banking Laws, Legal Malpractice, Indemnity)
FORMER OFFICERS AND DIRECTORS OF INDEPENDENT BANK OF SANDY: C. DALE BROOKENS, LESTER HARDY, JOHN ROWELL and THOMAS WOLF as a director and as counsel for Independent Bank of Sandy,	)	
Defendants.	)	

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JURISDICTION AND VENUE

I.

All suits of a civil nature at common law or in equity to which the Federal Deposit Insurance Corp. ("FDIC") shall be a party shall be deemed to arise under the laws of the United States, and the United States District Courts shall have original jurisdiction thereof without regard to the amount in controversy, pursuant to 12 U.S.C. § 1819.

II.

Venue under 12 U.S.C. § 1819 properly is laid in this District because all the banks involved in this action are or were corporations organized under the laws of the State of Oregon and authorized to conduct banking business under the Oregon Bank Act, ORS Chapters

706 to 716.

PLAINTIFF

III.

Plaintiff FDIC is a federal agency created and extant pursuant to 12 U.S.C. § 1811. The FDIC is authorized to sue and be sued, complain and defend, in any court of law or equity, state or federal, pursuant to 12 U.S.C. § 1819 (Fourth).

IV.

Plaintiff FDIC brings this action in its corporate capacity as subrogee to all rights of the owners of deposits in the closed and terminated insured banks, to the extent of payments made by the FDIC on behalf of the depositors. Plaintiff in it corporate capacity also brings this action as assignee of the receiver of UBO. The claims of the receiver are those the banks and their shareholders

had against the defendant officers and directors.

PRELIMINARY STATEMENT

V.

The United Bank of Oregon ("UBO") came into operational existence on January 3, 1983. UBO resulted from the merger of three Oregon banks: Metropolitan Bank, Oak Grove, ("Metropolitan"); Independent Bank of Sandy, Sandy ("IBS"); and Willamette Falls State Bank, Oregon City ("Willamette Falls"), all of which were chartered in 1978.

By 1983, Metropolitan, IBS and Willamette falls were crippled by inadequate, incompetent and in some cases dishonest managing officers and directors. The mismanagement resulted in each of the banks suffering severe credit

problems which the banks were unable to absorb.

The original incorporators of the banks were leaders of the banks who hoped to have the banks work in cooperation with one another. Prior to the merger, this was done primarily through participation agreements with respect to loans. This "affiliation" ultimately gave rise to the proposal to merge the subject banks into one in the hope that the resulting larger merged bank would be able to cope with the precarious credit and related problems of each merging bank.

The poor credit quality of each bank's loan portfolio led to substantial losses prior to the merger. It also adversely affected the earnings of each bank prior to the merger and continued to

depress the earnings of the UBO after the merger.

In addition to increasing loan losses and nonperforming loans, each bank had excessive overhead costs, which were nearly double the norm for banks of equal size in Oregon. Overhead costs were excessive in areas of salary, occupancy and other operating expenses.

Officers and directors of each bank failed to take adequate steps to check loan losses, and the quality of each loan portfolio continued to deteriorate. These factors and high overhead expenses contributed to the ultimate demise of the UBO. The primary cause for failure of UBO was the severe, pervasive and crippling loan losses in the loan portfolios acquired from Metropolitan, IBS, and Willamette Falls.

ACCRUAL OF PLAINTIFF'S CLAIMS

VI.

UBO succeeded to all the property, rights, powers and duties of each of the merged banks. All property, all debts, all choses in action and every other interest of each bank were transferred to and vested in UBO automatically pursuant to ORS 711.040(2), including all of the Claims for Relief below.

VII.

UBO has standing to prosecute all existing claims by or against each of the three banks, as if the merger had not taken place, in accordance with ORS 711.040(3).

VIII.

Plaintiff's right to sue did not accrue until UBO was declared insolvent by the State of Oregon, Superintendent of

Banks, and was closed on March 2, 1984, and the FDIC was appointed receiver. The rights of UBO, Metropolitan, IBS, and Willamette Falls to sue the defendants in this case did not accrue while the culpable directors remained in control of UBO, Metropolitan, IBS, and Willamette Falls.

METROPOLITAN BANK

IX.

Metropolitan was incorporated on March 7, 1978, and began doing business as a bank on January 8, 1979. Metropolitan was incorporated by Nick I. Goyak, Frank Reynolds, Joseph T. Hagen and Norman L. Lee.

* * *

18.

From time to time between March 26, 1979, and December 31, 1982, the FDIC and

the Superintendent of Banks for the State of Oregon issued reports of examination to Metropolitan. Brief summaries of those reports follow:

(a) On March 26, 1979, the State Banking Division issued a report. Metropolitan had assets of $4,445,000. The bank was advised to develop a more comprehensive loan policy.

(b) On September 6, 1979, the State Banking Division issued a report on the condition of Metropolitan as of August 17, 1979. It had assets of $8,197,000. Metropolitan had a loan-to-deposit ratio of 97.9%, and was advised to reduce this ratio to 80% within 120 days. The bank's loan policy stated that the loan-to-deposit ratio should not exceed 75%; should the ratio exceed 75%, the bank was to maintain a

restrictive loan posture. Metropolitan also concentrated an excessive 80% of its commercial loans in real estate, and had contradicted its loan policies in making a number of these real estate loans.

(c) On April 4, 1980, the FDIC issued a report on the condition of the bank as of January 15, 1980. Metropolitan had assets of $9,949,000. It had not reduced its loan-to-deposit ratio to 80%, although 132 days had passed since the directive contained in the September report. It had a loan-to-deposit ratio of 97.2%, which exceeded industry standards. The problem was exacerbated by the fact that a large percentage of total deposits was controlled by a few large depositors. Metropolitan was advised to adopt an investment policy which addressed

liquidity problems and placed limits on loan volume.

Metropolitan was advised that the attendance records of a number of directors was unsatisfactory. It was also advised that its operating expenses were excessive, and that it lacked a policy of periodic review of expenses.

The bank was further advised that a $100,000 loan granted on May 31, 1979, with a due date of May 31, 1980, to the law firm of director Nick Goyak and secretary Thomas Hagen was made in violation of FDIC policies which prohibited loans to shareholders for the purchase of stock in the corporation.

(d) On June 30, 1980, the State Banking Division issued a report on the condition of the bank as of June 13, 1980. Metropolitan was advised that the

condition of the bank was "fair" under interagency rating standards, and that high loan-to-deposit ratio (107%), quality of loans, and deposit concentration were problematic.

Loan-to-deposit ratios had exceeded 100% for each month in 1980, even though the Metropolitan Executive Committee had imposed a loan moratorium in January, 1980.

The bank made five loans totaling $322,500 to five borrowers during the first half of 1980, with proceeds paid to assume loans from other banks. $1,468,600 of the loans in the portfolio were past due (16.2%) and $1,878,358 were renewals of short-term commercial loans (20.6%). Metropolitan was advised that these past due loans and renewals required immediate attention.

There were classified loans of $672,878, representing 7.4% of the loan portfolio and 35.7% of capital and reserves. Metropolitan was advised that these figures were excessive, that the loan-to-deposit ratio was extremely critical, and that a loan portfolio of questionable quality was emerging.

Although loans to directors were within statutory limits, they represented a concentration of credit. Seven directors had aggregate loans in excess of $824,000, or 46.7% of Metropolitan capital, and 9.1% of all loans. These loans were considered excessive. The $100,000 loan to the law firm of director Goyak, which had been criticized in the report of April 4, 1980, was still on the books.

As a result of this examination, the bank was fined for incorrect reserve calculations resulting in a reserve deficiency for the period of March 26-30 of 1980. This was due to calculation of certain assets as reserves when, in fact, they had been previously pledged, in violation of ORS 708.100. Attendance by directors at monthly board meetings was not satisfactory. Two directors, Adams and Miller had attended only 50% of the meetings. Minutes of directors' meetings were not properly approved.

Deposits were concentrated in a small number of depositors, including time deposits of $1,264,942 (14.9% of total deposits) by Portland Memorial and Skyline Memorial. Two time certificates of deposit in the amount of $100,000 each, made at the rate of 17% for one

year, were obtained by two bank customers in order to provide funds to make loans to the same two customers. Metropolitan was advised that such practices were questionable.

(e) On January 9, 1981, the State Banking Division issued a report. Metropolitan was advised that the condition of the bank was "fair." This low rating was attributed to a large volume of doubtful loans and excessively high loan delinquencies. Metropolitan was advised that many of its problems could have been avoided if the directors and executive management had more closely supervised lending practices.

The bank was advised that adversely classified loans exceeded $864,000; the ratio of adversely classified loans to capital was an inordinately high 43%.

Twenty-four percent (24%) of the criticized loans were classified as "doubtful." Metropolitan was advised that a large volume of loans lacked satisfactory credit information or represented high credit risks, and that the directors must become fully cognizant of these problems. The ratio of delinquent loans to gross loans was an excessive 18% and represented an increase in both percentage and dollar amounts from the last report. The bank was further advised to more closely scrutinize applications, to impose stricter standards on renewals, and to intensify collection efforts.

The loan-to-deposit ratio remained excessive at 95% and Metropolitan was criticized because it did not have a broader deposit base.

(f) On May 8, 1981, the FDIC issued a report. The report criticized Metropolitan and stated that the directors' failure to supervise loan officers and administer loan policies had resulted in a poor and rapidly deteriorating asset quality and a precarious liquidity situation. Specifically, the report stated:

(i) the directors and officers failed to reduce the excessive loan-to-deposit ratio, which was 104%, even after repeated admonitions to do so;

(ii) the directors failed to supervise liquidity, to obtain liquidity reports from management, and to enforce liquidity policies;

(iii) the directors failed to supervise lending to obtain adequate reports on loans;

(iv) the directors over-relied on the CEO, J. Knox Corbett, and did not supervise or monitor his performance;

(v) the directors failed to supervise or review expenses.

Metropolitan was advised that adversely classified assets exceeded $2,480,000, or 120% of its book capital and reserves. It was also advised that many of its adversely classified loans were made in violation of loan policies (i.e. unsecured loans were not to exceed a term of 90 days; loans to new enterprises were deemed not desirable if repayment was dependent upon profitable operation). The directors approved loans only after the loans had been made and granted approvals based upon inadequate information, especially with respect to large loans. The directors were lax in

defining and enforcing credit standards. Vigorous enforcement of these standards was advised as urgently needed.

Loan delinquencies represented 13.2% of the loan portfolio, and were still excessive even though loan extensions and renewals were liberally granted. The directors failed to periodically review classified loans, and collection efforts were minimal.

Documentation for loans was deficient, and the directors failed to supervise such documentation. Loans were secured by "brokered deposits." In a brokered deposit, the borrower pays a portion of the loan proceeds to a money broker, and in return funds of a third party are placed on deposit at the bank. Later, if the deposit is

withdrawn, the bank can be left with a loan of unacceptable quality. The brokered money is not a compensating balance because the bank has no right to offset the unpaid balance of the loan against the brokered deposit. Such loans were made without prior authorization by the Board. The directors reviewed only loan-to-deposit ratios, and did not consider any other factors which affected liquidity. No liquidity policy had been adopted by the bank, in spite of past reports by bank examiners which addressed the liquidity issue.

Metropolitan had experienced a reduction of adjusted capital and reserves of 23% since its inception two years earlier. This reduction was caused by loan losses of $238,000, excessive pre-opening expenses, and high occupancy

and operating expenses, including President Corbett's expense account, legal and auditing expenses, and advertising expenses.

Metropolitan was advised that a number of loans had been made to officers and directors in violation of Regulation O or in violation of loan policies of the bank, or were otherwise unjustifiable under the circumstances. It was also advised that its operating expenses were excessive and in particular, payments to director Steven Hungerford for advertising and supplies and to director Goyak for attorney fees were unjustifiably high. The bank was criticized for continuing to carry on its books a loan to director Goyak for purchase of bank stock, a loan which had been criticized in earlier reports.

Metropolitan was advised that the loan loss reserve was insufficient. Loans classified as "loss" and 50% of those classified as "doubtful" exceeded the loan loss reserve by $124,900. A Memorandum of Understanding was entered between the Bank, the FDIC, and the Superintendent of Banks on September 18, 1981.

(g) On January 8, 1982, the State Banking Division issued a report. The condition of the bank was listed as "marginal" due to the failure of the directors and officers to supervise the banks affairs. There was an excessive number of classified assets; excessive delinquent obligations; an excessive loan-to-deposit ratio (103.5%); severe earnings losses; severe declines in capital, assets, and deposits; and

significant liquidity problems, all of which had been addressed in previous reports, and none of which had been corrected.

The loan losses were caused by the directors' inadequate supervision and failure to adhere to adequate loan policies. 28.7% of the loans in the loan portfolio were delinquent. Of these nearly $2,200,000 were "substandard" (19%), over $644,700 were "doubtful" (5.6%), and over $468,400 were "loss" (4%). Over $900,000 of the loans had interest of six months or more past due.

The bank was advised that its lending practices with regard to SBA guaranteed loans might result in the denial of liability by the SBA with respect to such loans. SBA loans totaled

more than $2,370,000.

Metropolitan was also advised that numerous loans had been rewritten in order to avoid having them placed on the delinquent list. Many of the rewritten loans included additional monies to "capitalize" the past-due interest. At least $38,400 had been capitalized by Metropolitan since the report of May 8, 1981, and the bank had paid $65,200 to the SBA because borrowers had been unable to pay interest on SBA loans.

Metropolitan's adjusted capital and reserves had been reduced by $1,391,711 since the bank's inception, a reduction of 59%. This erosion was attributable to loan losses and high occupancy and operating expenses. The bank's liquidity position was precarious, caused by excessive lending, the failure to

supervise lending practices, inadequate monitoring of liquidity, and unacceptable practices, including the use of brokered deposits.

Director Ernest Miller was criticized for having attended only 8 of 15 (55%) of the board meetings since the last report.

(h) On March 26, 1982, the FDIC issued a report. Metropolitan was advised that the volume of classified loans had increased and remained excessive. Loans classified as loss totaled $432,100; substandard loans totaled $2,769,300. Adversely classified assets which were predominantly loans, represented 251% of the bank's total capital and reserves.

The amount of delinquency was $2,547,300, which represented 26.9% of

the loan portfolio. In spite of the fact that the bank charged off $650,000 in loans in 1981, loan classifications remained excessive. The loan-to-deposit ratio was 106%, and the bank relied on large deposits. 31% of total deposits were controlled by six large depositors.

Metropolitan was advised that the loan loss reserves which had been provided in the first two years of operation had proven to be inadequate. Even after this adverse experience new reserves remained inadequate. In spite of this, the bank made no provisions for loan losses in the first quarter of 1982.

19.

Plaintiff has sustained losses on the loans made by Metropolitan and more specifically described in subparagraphs

(a)-(p) below, in an amount which totaled $2,446,456.03 as of March 31, 1987.

* * *

32.

From time to time from July 30, 1979, until July 2, 1982, the FDIC and the Superintendent of Banks issued reports of examinations to IBS. Brief summaries of those reports follow:

(a) On July 30, 1979, the State Banking Division issued a report. The report indicated that the loan files generally were satisfactory, but advised IBS that it was not properly securing loans pursuant to the Uniform Commercial Code and was not properly documenting mortgages.

(b) On January 4, 1980, the FDIC issued a report. IBS was advised that expenses, and particularly legal fees,

were unjustifiably high and greatly exceeded the projected expenses which were disclosed in IBS' application to the FDIC for insurance. Such fees were paid to the law firm of director and defendant Wolf.

The bank was advised that loans to insiders were inordinately high and that such insider loans totaled $739,700, which represented 22% of the total loans and 82% of total capital of IBS. Included within this number was an $86,000 auto loan to legal counsel and secretary Thomas Wolf and a $283,000 loan to director Hardy, which was made in violation of bank lending policies relating to unsecured realty development loans. The report stated that IBS had made numerous loans to unsecured real estate developers and to out-of-area

borrowers, in violation of bank loan policies. Loan files were disorganized and loan documentation was not appropriate. IBS was advised to establish a loan loss reserve account and the directors were criticized for the lack of candor in board minutes. Specifically, the minutes of a Board meeting immediately following a visitation by the FDIC examiner in November, 1979, stated that "most areas were reviewed without criticism." In fact, the examiner had criticized the $739,000 insider loan volume and the lack of documentation of three loans totaling $158,000.

(c) On February 2, 1981, the FDIC issued a report. IBS was criticized for making loans on the basis of brokered deposits proscribed by FDIC policy rather

than on the basis of the quality of the credit risk. Adversely classified loans exceeded $746,000 and represented 10.5% of the total loans of IBS and 73.2% of capital and reserves.

IBS was advised that its practice of rewriting loans at maturity on more liberal terms was not a sound banking practice, nor was the large volume of loans to out-of-area borrowers. The ratio of overdue loans to total loans was high, at 13% of the total loan portfolio, and the bank was advised to improve its collection policies.

IBS had not established sufficient loan loss reserves in spite of the examiner's recommendation in July, 1980. IBS had provided $5,000 in the loan loss account; IBS' CPA had recommended $50,000 and the recommended

amount of such reserves for banks of comparable size was 1% of the total loan portfolio ($71,000).

IBS was advised that bonuses given to management in 1980, which totaled 80% of the annual salaries of senior management and were the maximum obtainable under IBS' bonus plan, were excessive and unjustified. IBS was advised that the calculation of the bonuses was based upon favorable and inaccurate reporting of the earnings of the bank. Those in management who received the bonuses were not, in fact, entitled to them. Also, those bonuses were not properly entered into bank records resulting in an overstated financial position for the bank the year following the bonuses.

(d) On July 1, 1981, the State Banking Division issued a report. IBS was advised that its financial condition had deteriorated and was "fair". The directors were advised that the condition was a result of their failure to supervise loan officers, of liberal extensions of credit, and of insider transactions. IBS was advised that since the last report six violations of laws and regulations relating to lending practices had occurred. IBS had failed to reduce its classified loans. Assets subject to classification equaled 116.5% of the capital accounts and 14.9% of gross loans. The ratio of overdue loans to gross loans, 14.5%, was excessive.

IBS was advised that loan documentation was not satisfactory. Many loans were made without adequate credit analysis and loan files did not indicate definite loan purposes or repayment schedules. IBS had not established an adequate loan loss reserve.

(e) On January 15, 1982, the FDIC issued a report. IBS was advised that its financial condition had worsened and was a result of failure of management to supervise loan officers and loan practices, and to heed the previous advise of regulatory agencies. The directors were advised of the following supervisory problems: employment of liberal credit policies, resulting in excessive loan losses and classifications; lax collection procedures and abnormally high loan delinquencies;

failure to provide adequate reserves for loan losses; inaccurate monitoring of accounting systems, resulting in inaccurate reports of financial condition; and permitting legal violations with respect to lending, including excessive insider loans.

IBS was advised that loan classifications had doubled since the FDIC report of February, 1981, and exceeded $1,642,000 or 174.6% of capital accounts and 24.4% of the total loan portfolio. This ratio was excessively high. Over $500,000 of this amount represented new advances since the critical examination report of February 2, 1981. These figures indicated severe problems for the bank.

IBS was advised that such classifications and loan losses were the

result of failure to analyze borrowers, failure to obtain credit checks, failure to investigate collateral for repayment priority, extending credit based upon the success of unestablished businesses, and of making loans to borrowers whose applications had been rejected by other lenders. The directors were criticized for their continued superficial review of these lending policies and for being uninformed.

IBS also was advised that it did not obtain adequate security for loans. 28%, or $1,818,000 of the loan portfolio was overdue and collection practices had not improved. IBS' capital had been seriously eroded by poor earnings and loan losses. Earnings had dropped sharply in one year primarily because of the provision for loan losses and also

because the bank's net interest margin fell from 8.12% in 1980 to 7.01% in 1981. Staffing costs remained unjustifiably high; occupancy and equipment expenses were nearly double that of peer group banks. IBS was advised that its financial condition also was worsened by the withdrawal of $1,500,000 in brokered deposits during the examination period. Two additional legal violations had occurred since the report of July, 1981, including an insider loan (Regulation O) violation.

(f) On July 2, 1982, the State Banking Division issued a report. IBS was advised that its condition had declined to unsatisfactory. The directors were criticized as suffering from an extreme lack of common, sound banking knowledge. Classified loans

exceeded $1,677,000 and represented 444.2% of capital accounts. This was a significant increase over the excessive 116.5% ratio of one year earlier. Overdue loans totaled $2,241,398, or 42.5% of the loan portfolio. IBS was advised to seek counsel with respect to nonpayment of $325,000 by director Hardy. The Hardy loan previously had been criticized and was a Regulation O violation.

33.

IBS has sustained losses on the loans more specifically described in subparagraphs (a) - (g) below in an amount which totals $1,399,330.30 as of March 31, 1987.

* * *

43.

From time to time from August 24, 1979, until March 26, 1982, the FDIC and the Superintendent of Banks issued reports of examination to Willamette Falls. Brief summaries of those reports follow:

(a) On October 24, 1979, the State Banking Division issued a report. Willamette Falls was advised that its condition was satisfactory but was criticized because of lack of documentation in loan files, particularly with respect to the bank's security interest, the purpose of loans, and repayment programs.

(b) On March 25, 1980, the State Banking Division issued a report. Willamette Falls was advised that its loan-to-deposit ratio of 89.4% was

excessive, and that a ratio of 2.8% of past due loans to gross loans was high.

(c) On September 5, 1980, the FDIC issued a report. Willamette Falls was advised that loan documentation was inadequate, especially relative to loan security. It was also advised that its loan loss reserve account was inadequate and that loan losses far exceeded reserves. Willamette Falls was criticized because its loan-to-deposit ratio exceeded the bank's policy limits of 70-75%.

(d) On February 6, 1981, the State Banking Division issued a report. Willamette Falls was advised that its condition was fair. The loan-to-deposit ratio of 102.2% was excessive and was cited as contrary to bank policy. The bank was criticized because loans were

not properly documented. The loan loss reserve of only $3,000 was insufficient and well below the recommended 1% of gross loans. Willamette Falls was advised that Board minutes were inadequate and that such minutes must comply with ORS 707.675. It also was advised that directors' attendance and participation was problematic and that Peter Norrie had not fulfilled his obligations as a director.

(e) On June 16, 1981, the FDIC issued a report. The directors were criticized for collectively sanctioning a pattern of hazardous and self-serving activities by the bank. Harmful trends of the past were exacerbated by the Board's unresponsiveness. The Board was advised to not rely on hopes of merger, but to address the bank's problems

directly. The Board was further advised to shed its generally passive attitude and begin active support.

Willamette Falls was advised that the loan-to-deposit ratio of 108.8% was excessive; the ratio of classified assets to capital and reserves of 151.3% was unacceptable; and the classified loans represented 31.1% of the loan portfolio. Willamette Falls had sustained loan losses of $448,200 and had loans of doubtful collection of $45,500 and loans of substandard quality totaling $1,487,600. It also had a loan delinquency ratio of 18.4% which showed a 4.8% increase from the last FDIC examination. These figures indicated a lack of supervision and poor judgment when loans were made. Willamette Falls was advised that its asset condition was

poor. It had net liquid assets of only $900,000 and of this amount $700,000 represented deposits made to the bank by directors under emergency conditions. The bank was told that its liquidity problems were the result of the failure to adopt and implement appropriate liquidity policies. It was advised that its reserves for loan losses were inadequate and that its overhead expenses were too high. The report specifically criticized excessive legal fees to director Potter's law firm, a bloated staff, and an unduly large volume of items being processed without adequate fees.

Willamette Falls had failed to charge off losses in 1980, thus permitting the bank to report modest profits rather than loss. The bank was

warned that such loss deferral, which results in inaccurate portrayal of the bank's performance, was unacceptable; the Board was aware of such distortion and manipulation. It was advised that capital had been eroded by $665,000, or 44%, since the bank's incorporation only 22 months previously.

Insider loans, excluding amounts in which other banks participated, had risen to $954,000 or 17.5% of the loan portfolio. This represented a 171.3% increase since the previous FDIC examination. The bank was advised that a number of these loans were classified as substandard and were made in violation of Regulation O. Willamette Falls was warned specifically about two of these violations: a loan to Apex Towing, guaranteed by director Nichols, and a

loan to Evans Farms, an interest of director Evans, used to cover an overdraft.

Willamette Falls was advised that the lack of participation in the bank's affairs by members of the Board was not acceptable, that there had been three regulatory violations, including lending limit and Regulation O violations, and that the bank's handling of correspondent bank accounts was not appropriate. The directors' supervision of the bank was considered poor and unresponsive to regulatory criticisms.

(f) On January 8, 1982, the State Banking Division issued a report. Willamette Falls was advised that the condition of the bank was unsatisfactory and that the bank had not followed sound lending policies. Even though the Board

acknowledged at the previous examination that a more sound lending policy was needed, the examiner criticized the Board for its failure to implement such a policy. Overdue and classified loan totals had increased since the previous examination in spite of charge-offs.

Operating losses of $480,000 and a current loss of $1 million reduced the bank's capital to $895,000, a substantial reduction from the $1,500,00 capital position when the bank was opened. The ratio of classified loans to gross loans was 33.7% and the ratio of classified loans to capital and reserves was 181.9%, both excessively high. There was an insufficient reserve for loan losses, which equaled only 0.4% of the loan portfolio, well below the 1% recommended for banks of similar size. The bank was

advised that immediate action was necessary in order to resolve these problems. In view of the high delinquency in classifications of loans, and the erosion of capital through operating and loan losses, the examiner recommended that bonds pledged to the Pool Manager for issuance of certificates to public fund deposits be increased from 25% to 110%.

(g) On March 26, 1982, the FDIC issued a report. A Cease and Desist Order was issued to Willamette Falls on January 25, 1982, effective February 4, 1982. The order was issued because of the unsafe and unsound practices of bank management. These included: hazardous lending and collection practices, operating with an excessive volume of poor quality loans, operating without

sufficient reserves, making loans without sufficient documentation and credit information, operating without adequate provision for liquidity, and extending credit to insiders imprudently and in violation of law.

Willamette Falls was advised of five additional legal violations involving loans, including three to insiders since the FDIC examination of June, 1981. Classified loans totaled $1,803,200, representing 212.1% of capital and reserves and an increase from the already excessive 151.3% ratio of June, 1981. Loan classifications reduced the bank's capital and reserves to $590,200, or 39% of the bank's initial capitalization ($1,500,000). The ratio of delinquent loans to total loans rose from 18.4% in June, 1981, to 19.9%. This ratio was

understated because the bank followed the practice of renewing loans without collection of interest. This practice included at least 12 loans with a value of $620,768, or 13% of the loan portfolio. The directors were criticized for their failure to discuss individual loans at Board meetings.

Although the bank had reduced insider loans from $954,000 to $481,200 since June, 1981, two insider loans totaling $265,300 were adversely classified and a loan in the amount of $94,200 to director Molendyk became two payments delinquent during the examination period. Willamette Falls was advised that three Regulation O violations had occurred and that since 1981 the bank had made loans totaling $690,600 to director Nichols or his

interests. A number of these loans were made when the bank was experiencing severe liquidity problems in January, 1982.

Operating expenses were criticized as being higher than that of peer group banks. Especially notable were legal fees of nearly $33,000 to director Potter's law firm for collection efforts which were considered not cost-effective. Also noted by FDIC was $19,428 charged to officer expense accounts and $51,873 charged to sundry losses consisting of mainly charged-off overdrafts.

44.

Willamette Falls has sustained losses on the loans more specifically described in paragraphs (a) through (g) below in an amount in excess of

$842,905.26 as of March 31, 1987.

* * *

CLAIMS FOR RELIEF

(Breach of Fiduciary Duty)

Common Allegations

61.

The directors and officers of each of the banks owed a duty of reasonable prudence, care and oversight in the discharge of their responsibilities to the bank and its depositors to preserve the bank's assets so that the depositors would have their money available to them.

62.

The duty of reasonable care included the specific duty of oversight of the staff of the bank. This duty existed even if the directors and officers believed their subordinates to be trustworthy. These duties also

specifically included compliance, and supervision of compliance by subordinates, with the bank's lending policies, applicable statutes and regulations, and reasonable, prudent lending practices.

63.

All these duties owed by the directors were implicit in the office of bank director, and had to be exercised without prompting. These directors, through their oaths of office, were made aware of the seriousness of these duties. Also, the directors and officers were advised of their duties through instruction from legal counsel of the parameters of the duty of bank directors. Finally, the directors and officers were advised of the need to take affirmative action to discharge their

duties when regulatory agencies instructed the directors that the bank needed a more comprehensive lending policy. After these initial warnings, the directors were repeatedly made aware by regulatory agencies that there were problems with the bank's supervision and lending practices. These warnings constituted inquiry notice.

64.

The directors and officers had full control over their subordinates' decisionmaking.

65.

Had the defendants exercised their due care responsibilities, the loan losses would not have taken place. The harm to the depositors from such improvident loans would have been evident upon the barest of inquiries, and the

defendants would not have approved of such actions if acting prudently. Thus, defendants' failure to exercise due care was the proximate and substantial cause in fact of plaintiff's injuries.

FIRST CLAIM FOR RELIEF

Breach of Fiduciary Duty:

Metropolitan

66.

Plaintiff realleges paragraphs 1 through 26 and 54 through 65 and incorporates them by reference.

67.

The defendant former directors and officers of Metropolitan State Bank breached their duties of care and supervision by failing to monitor the performance of their loan officers and by their affirmative actions in approving loans, including insider loans. The

officers and directors did not follow the bank's lending policies, did not follow the guidelines of reasonably prudent lending, and the officers were not required to do so by the directors. Specifically, the directors and officers breached their duties in one or more of the following ways:

* * *

SECOND CLAIM FOR RELIEF

Negligence: Metropolitan

70.

Plaintiff realleges paragraphs 1 through 26, 54 through 65, and 67-68 and incorporates them here by this reference.

71.

The injuries sustained by depositors and paid for by plaintiff were a

foreseeable result of defendants' negligence.

72.

As a result of defendants' negligence, plaintiff has sustained damages more particularly described in paragraphs 19-26 and 60 above.

THIRD CLAIM FOR RELIEF

Breach of Fiduciary Duty:

Independent Bank of Sandy

73.

Plaintiff realleges paragraphs 1-8, 27-38 and 54-65 and incorporates them here by reference.

74.

The directors and officers of Independent Bank of Sandy breached their duties of care and supervision by failing to monitor the performance of their loan officers and by their affirmative actions

in approving loans, including insider loans. The officers and directors did not follow the bank's lending policy, did not follow the guidelines of reasonably prudent lending, and the officers were not required to do so by the directors. Specifically, the directors and officers breached their duties in one or more of the following ways:

* * *

FOURTH CLAIM FOR RELIEF

Independent Bank of Sandy: Negligence

78.

Plaintiff realleges paragraphs 1 through 8, 27-38, and 74-76 and incorporates them here by this reference.

79.

The injuries sustained by depositors and paid for by plaintiff were a

foreseeable result of defendants' negligence.

80.

As a result of that negligence, plaintiff has sustained damages more particularly described in paragraphs 33-38 and 60 above.

FIFTH CLAIM FOR RELIEF

Willamette Falls Bank: Breach of Fiduciary Duty

81.

Plaintiff realleges paragraphs 1-8 and 39-65 and incorporates them by reference.

82.

The directors and officers of Willamette Falls State Bank breached their duties of due care and supervision by failing to monitor the performance of their loan officers and by their

affirmative actions in approving loans, including insider loans. The officers and directors did not follow the bank's lending policies, did not follow the guidelines of reasonably prudent lending, and subordinates were not required to do so by the directors and officers. Specifically, the directors and officers breached their duties in one or more of the following ways:

* * *

SIXTH CLAIM FOR RELIEF

Willamette Falls: Negligence

86.

Plaintiff realleges paragraphs 1 through 8, 39-65 and 82-84 and incorporates them here by this reference.

87.

The injuries sustained by depositors and paid for by plaintiff were a

foreseeable result of defendants' negligence.

88.

As a result of defendants' negligence, plaintiff has sustained damages more particularly described in paragraphs 44-53 and 60 above.

SEVENTH CLAIM FOR RELIEF

Statutory Violations: Federal Law

89.

Plaintiff realleges paragraphs 1 through 88 above.

90.

Defendants made and allowed loans to directors in violation of 12 USC § 375(b), 12 USC § 1828(j)(2) and 12 CFR §215.4(a) and (b).

EIGHTH CLAIM FOR RELIEF

Statutory Liability: ORS 708.470

91.

Plaintiff realleges paragraphs 1 through 90 above.

92.

Defendants knowingly or negligently made or allowed loans to be made in an unlawful or dishonest manner. Plaintiff has sustained damages, more particularly described in paragraphs 19-26, 33-38 and 44-53 above, as a result of those loans. Pursuant to ORS 708.470, defendants are liable to plaintiff for those damages.

NINTH CLAIM FOR RELIEF

Indemnity

93.

Plaintiff realleges paragraphs 1 through 92 above.

94.

Defendants are liable to the bank's depositors for the losses caused by defendants' breach of fiduciary duty, negligence and breach of statutory obligations.

95.

Plaintiff acted in its corporate capacity as insurer of deposits of UBO transferred there from Metropolitan Bank, IBS, and Willamette Falls. Plaintiff provided the money necessary to meet those deposits. This was done by giving money to FDIC as receiver so that it in turn could pay a third party bank for assuming UBO's deposit liabilities for which there were no assets. This asset shortfall, which was the injury to the depositors, was paid for by plaintiff but caused by defendants. Thus defendants

received a benefit by avoiding payment for the damage caused by their breach of duty. Defendants must indemnify plaintiff for bestowing that benefit, in an amount to be determined at trial.

TENTH CLAIM FOR RELIEF

Legal Malpractice: Attorney Wolf

* * *

ELEVENTH CLAIM FOR RELIEF

Breach of Fiduciary Duty - Self-Dealing: Defendant Wolf

* * *

TWELFTH CLAIM FOR RELIEF

Breach of Fiduciary Duty - Self-Dealing: Defendant Hardy

106.

Plaintiff realleges paragraphs 33(c) and 36(c) and incorporates them by reference.

107.

Director Hardy owed a duty of fidelity, fair dealing and candor when he transacted business with the bank.

108.

Director Hardy breached his fiduciary duty by arranging a loan for which the rights and responsibilities were assigned to him. The money was interest-free for several months, then accrued interest at substantially less than market rates. The transaction was unfair and overreaching and therefore, could not have been justifiably ratified by the board of Independent Bank.

109.

As a result of defendant Hardy's self-dealing, plaintiff sustained losses on interest in an amount as yet undetermined, but to be determined as

trial comparing the market value of the loan made to Hardy and the value of the loan actually made.

THIRTEENTH CLAIM FOR RELIEF

Breach of Fiduciary Duty -

Self-Dealing: Defendant Potter

110.

Plaintiff reasserts paragraphs 39-43 and incorporates them here by reference.

111.

Director Potter owed a duty of fidelity, fair dealing and candor when he transacted business with the bank.

112.

Director Potter breached his fiduciary duty by failing to disclose the extent of his financial interest in the law partnership that acted as legal counsel for the bank during incorporation

and operations. Thus the board of directors was never given the opportunity to knowingly or intelligently ratify the transaction with this insider. The self-dealing transaction was so advantageous to director Potter and injurious to the corporation that it amounted to overreaching.

113.

As a result of defendant Potter's self-dealing, plaintiff sustained losses of legal fees in an amount as yet undetermined, but to be determined at trial considering the amount paid by the bank in excess of the fair value of legal services rendered.

114.

The actions of defendant Potter proximately and directly caused in fact the injury sustained by plaintiff.

WHEREFORE, plaintiff respectfully requests:

1. Damages in an amount to be determined at trial;

2. The costs of this action;

3. Such further relief as the court deems appropriate.

DATED this 1 day of July, 1987.

LINDSAY, HART, NEIL & WEIGLER

By: _____
Carol A. Hewitt
Thomas A. Balmer
Linda M. Seluzicki

Of Attorneys for Plaintiff

AFFIDAVIT OF CRAIG ROBINSON

STATE OF WASHINGTON)
) ss.
Clark County)

I, Craig Robinson, having first been duly sworn, do depose and say:

1. I was chief executive officer and a member of the board of directors of Metropolitan Bank from August, 1981, until it merged with the Independent Bank of Sandy and Willamette Falls State Bank in January, 1983. I make the following affidavit based on my own personal knowledge of the events described. During my tenure as chief executive officer and member of the board of directors of Metropolitan Bank, I gained extensive personal knowledge of bank operations and became familiar with all

the actions of the board of directors and bank committees.

2. Prior to being hired as chief executive officer of Metropolitan Bank, I had extensive familiarity with banking, having worked in the banking business generally for over 25 years. Before August, 1981, I had also developed an expertise in consulting with banks in serious financial trouble. In connection with this area of expertise, I had worked in close coordination with officers of the FDIC and the Oregon State Banking Commissioner's office. A copy of my current resume is attached as Exhibit "A."

3. Before commencing my term with Metropolitan Bank, I had served as chief executive officer of High Lakes Community Bank in La Pine, Oregon, and Deschutes

Bank in Redmond, Oregon. After leaving United Bank of Oregon, I was employed as chief executive officer of Columbia Pacific Bank in Portland, Central Point State Bank in Central Point, Bank of Northwest in Eugene, and Bank of Oregon in Woodburn. Each of these banks was a troubled bank, under a cease and desist order from the FDIC. My employment at these banks was at the request of the Oregon Superintendent of Banks and with the approval of the San Francisco FDIC offices. In all cases my efforts were directed toward saving the banks from failure and reducing loss exposure to the FDIC.

4. I was initially referred to Metropolitan Bank in August, 1981, by John Olin, Oregon State Superintendent of Banks. At the time I was referred to

Metropolitan Bank, the bank had received an unfavorable report from the FDIC containing criticisms of bank operations and management, its loan policies, and its loan losses. A copy of the May, 1981, FDIC examination report is attached as Exhibit "B." The State Banking Commissioner was strongly urging Metropolitan Bank to fire its current president and further urged the bank to hire me as chief executive officer in order to attempt to cure the problems that were at the source of the criticisms leveled by the FDIC and State Bank Examiners.

5. I was hired as chief executive officer of Metropolitan Bank in order to find prompt solutions to those problems identified by the FDIC examinations. I was also made a member of the board of

directors, and the directors on the board gave me the responsibility for eliminating deficiencies previously identified by FDIC examinations and for attempting to half the losses and to place the bank in more solvent condition. I was given the authority by the board to assess those losses, hire and fire employees, and to institute any legal action which would ultimately benefit the bank. True copies of the minutes of the Board of Directors of Metropolitan Bank from August, September, October and December, 1981, are attached as Exhibit "C."

6. As soon as I was hired by Metropolitan Bank, I educated myself as to the bank's operations and status of its loan portfolios. I became completely familiar with the May, 1981 FDIC

examination and prior state and FDIC examinations of the bank including the criticisms of bank operations contained in them. In particular, I was aware of all the criticisms leveled by the FDIC examiners regarding management deficiencies of the bank, inadequate supervision by the bank's board of directors, loans to directors and other criticisms. (Ex. B, pp. 1-8).

7. My efforts during my term as chief executive officer of Metropolitan Bank were devoted to restructuring and collecting loans, attempting to maintain solvency, and minimizing losses to the bank and the FDIC. I wrote a loan policy, a copy of which is attached hereto as Exhibit "D," which was approved by the FDIC and established a loan committee to underwrite extensions,

modifications and new credits. Problem credits identified by the FDIC exams were assigned to a new workout loan division. I had access to any information I required for this undertaking. There was no withholding of any information by any member of the Board of Directors.

8. After August, 1981, I controlled the banking operations. I dismissed a number of employees whose performance was less than adequate. I hired new specialists to aid in the collection efforts of delinquent loans. (Ex. C, p. 15). I restructured the manner in which banking operations were reported and analyzed by the board of directors. (Ex. C, pp. 7, 10, 11, 12). I had total cooperation from the board of directors of Metropolitan Bank.

9. During the latter half of 1981, in part at my request, several board members whose presence on the board had created the potential appearance of impropriety resigned. These board members included some of the defendants in this action including Mr. Hungerford and Mr. Coffelt. (Ex. C, p. 6). Resigning board members also included Mr. Goyak, who was the bank's counsel. (Ex. C, p. 6). Additionally, at the time I was hired, the board demanded and received the resignation of Knox Corbett, the former chief executive officer and board member. (Ex. C, p. 2).

10. During late 1981 and 1982, I was instrumental in assisting the board of directors of Metropolitan Bank in planning the merger with Willamette Falls State Bank and Independent Bank of

Sandy. Attached hereto as Exhibit "E" is a copy of the minutes of a joint meeting of these three banks. At this meeting I was appointed as consultant to Independent Bank of Sandy, Willamette Falls State Bank, and Chief Executive Officer of the United Bank Holding Company. I was also instrumental in hiring Jim Chester as president of Metropolitan Bank and proposed president of the merged banks. He was made a member of the board of directors. I resigned as chief executive officer and chairman of the board of directors of the United Bank of Oregon after the merger was concluded in January of 1983.

11. During the entire period of my tenure as chief executive officer and member of the board of directors of the Metropolitan Bank and United Bank of

Oregon there was never an attempt by any of the directors of Metropolitan Bank to unduly influence, coerce or intimidate me into taking or not taking any action. There was no attempt by the board members to hide information. The board uniformly followed my recommendations and was committed to whatever action I deemed appropriate to aid the attempt to stabilize bank operations.

12. During my period of employment at Metropolitan Bank and United Bank of Oregon, I thoroughly examined all potential claims the bank may have had and was familiar with all FDIC criticisms of bank management and the board of directors. I considered the possibility of suing directors and former directors of the bank as well as former officers. In fact, on one occasion, I did cause the

institution of an action against a former director of the Independent Bank of Sandy (IBS), based on an improper loan that was in violation of FDIC regulations.

13. Had I concluded that it would have been in the best interest of the bank to pursue a legal action against any present or former director deemed liable for any losses suffered, I would have recommended dismissal of that director and institution of an action against him. At no time did I conclude that such action was appropriate, with the exception of action instituted against former IBS director, Lester Hardy.

14. In August, 1982, prior to the completion of the merger between Independent Bank of Sandy, Metropolitan Bank, and Willamette Falls State Bank, I was directing the operations of all three

banks under the terms of my employment as consultant (See Ex. E). I became aware of a transaction of Independent Bank of Sandy completed in 1981 which benefited board member, Lester Hardy. I instructed the attorneys representing the Independent Bank of Sandy to file an action against Mr. Hardy for breach of fiduciary duty as a member of the board of directors. A copy of the complaint filed against Mr. Hardy is attached as Exhibit "F." Immediately prior to the filing of the lawsuit, Mr. Hardy was strongly urged to resign as a director due to the transaction. I would have taken similar action against any other directors of Metropolitan Bank, Willamette Falls State Bank or Independent Bank of Sandy, had I concluded that such an action would be in

the best interest of the banks. I considered filing suit against the banks' former president, J. Knox Corbett, but concluded that such an action would be uneconomical.

15. During my tenure at Metropolitan Bank and the United Bank of Oregon, I worked in close cooperation with the FDIC and State bank examiners. At no time was any recommendation made by those examiners to pursue claims against directors, former directors or former officers. Because of the bank's financial condition, we kept the FDIC fully informed of all of the bank's efforts, including the merger, and attempted to coordinate all efforts through the FDIC. In addition, the FDIC conducted extremely thorough examinations of Metropolitan Bank, Independent Bank of

Sandy, and Willamette Falls State Bank, prior to the merger of those institutions into United Bank of Oregon. At no time during the examination by the FDIC was any claim against directors, former directors or officers suggested to be appropriate.

16. I believe that the board of directors of Metropolitan Bank acted prudently and responsibly in attempting to correct all deficiencies in bank operations that were subject to criticism by the FDIC and State bank examiners. Once the fundamental problems present at Metropolitan Bank were brought to the attention to the board of directors in August, 1981, they took all actions that

were appropriate to correct those problems and displayed complete commitment to taking any action necessary for benefit of the bank.

/s/
Craig Robinson

SUBSCRIBED AND SWORN to before me this 12th day of June, 1987.

/s/
NOTARY PUBLIC FOR WASHINGTON
My Commission Expires: 12-1-88

AFFIDAVIT OF JAMES A. CHESTER

STATE OF WASHINGTON)
) ss.
County of King)

I, James A. Chester, having first been duly sworn, do depose and say:

1. I was the president of Metropolitan Bank from January, 1982 through December, 1982 and president of United Bank of Oregon from January, 1983 through its closure in March, 1984. I was a member of the board of directors of those banks during the same time periods. The following affidavit is based on my personal knowledge of events during the period of my employment at Metropolitan Bank and United Bank of Oregon.

2. During the time I was president and board member of Metropolitan Bank and

United Bank of Oregon, I was completely familiar with all the criticisms the FDIC and State examiners set forth in their examinations of the banks and I was completely familiar with all banking operations as well as all actions of the board of directors.

3. The board of directors of Metropolitan Bank and United Bank of Oregon did not attempt to coerce or influence me. There was never an attempt to intimidate me to take an action that was improper or into failing to take a course of action that I thought was appropriate. The board of directors of Metropolitan Bank and United Bank of Oregon operated in a straight forward, honest and responsible fashion at all times.

4. During 1982, the merger of Metropolitan Bank, Willamette Falls State Bank and the Independent Bank of Sandy was being planned. Lester Hardy, one of the directors of the Independent Bank of Sandy, was supposed to become a board member of the United Bank of Oregon. Because this board member had benefited by improper loans made by the bank upon whose board he served, I and Craig Robinson insisted that he resign from the Independent Bank of Sandy. We then directed the bank's attorneys to file suit against him for breach of fiduciary duty.

5. If I had become aware of any misconduct on the part of other directors, I would have also insisted on resignation by that director, and I would have considered filing suit against him

if such action would have been in the best interest of the bank. Likewise, I would have been attentive and responsive to any shareholder demands for action against any director I determined to be culpable for any wrongdoing.

6. I was familiar with the FDIC's criticisms concerning the administration and management of Metropolitan Bank. I was aware that the FDIC was critical of the Board of Directors, but I did not believe suit against the directors would be appropriate. If I had concluded such an action was appropriate, I would have

caused suit to be filed against the culpable director or directors.

_____
James A. Chester

SUBSCRIBED AND SWORN to before me this ___ day of June, 1987.

_____
NOTARY PUBLIC FOR OREGON
My Commission Expires:_____

Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1549 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANK LEE, ET AL., PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the statute of limitations for claims acquired by the FDIC from an insolvent financial institution begins to run on the date the FDIC is appointed conservator or receiver of the financial institution.

2. Whether, in an action by the FDIC against former officers and directors of a failed financial institution, federal common law governs the characterization of the FDIC's claims as sounding in tort or contract for purposes of determining the applicable limitations period.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1549

FRANK LEE, ET AL., PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-23) is reported at 884 F.2d 1304. The opinion of the district court (Pet. App. 24-67) is reported at 705 F. Supp. 505.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989. A petition for rehearing was denied on December 22, 1989 (Pet. App. 23a-23b). The petition for a writ of certiorari was filed on March 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1983, three financially troubled Oregon state banks, Metropolitan State Bank (Metropolitan), Independent Bank of Sandy (IBS), and Willamette Falls State Bank (Willamette Falls), were merged to form the United Bank of Oregon (UBO). UBO's board of directors was composed entirely of former directors of Metropolitan, IBS or Willamette Falls. In March 1984, the Oregon Superintendent of Banks declared UBO insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver of UBO. FDIC, as receiver, assigned to FDIC, in its corporate capacity, all UBO's claims against its officers and directors.

2. In February 1987, FDIC filed a complaint in district court against UBO's former officers and directors, alleging causes of action for breach of fiduciary duty, negligence, statutory violations, and indemnification (Pet. App. 36, 70-71, 77). Several of the defendants moved for summary judgment on the ground that FDIC's claims were barred by the three-year statute of limitations for tort actions brought by the United States or federal agencies. See 28 U.S.C. 2415(b).[1] The district court entered summary judg-

---

[1] Section 2415 of Title 28, U.S.C., provides, in relevant part:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * *.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the

ment in favor of the defendants. The court, applying federal law, concluded that each of FDIC's asserted causes of action sounds in tort rather than in contract or quasi-contract, and therefore is subject to the three-year limitations period of Section 2415(b) rather than the six-year period of Section 2415(a). The court further held that the three-year period began to run when Metropolitan, IBS and Willamette Falls were merged to form UBO. Relying on *United States* v. *Cardinal*, 452 F. Supp. 542 (D. Vt. 1978), the court rejected the FDIC's arguments that the claims did not accrue until institution of the receivership, and that the statute was tolled while the defendants dominated UBO's board. Pet. App. 43-50. On motion for reconsideration, the district court reaffirmed its decision. *Id.* at 52-67.[2]

3. FDIC appealed and the court of appeals reversed. It held that the FDIC's claim for breach of fiduciary duty sounds in contract, and therefore is subject to the six-year limitation period of 28 U.S.C. 2415(a). Pet. App. 12-15. The court concluded that there is a "substantial question as to whether FDIC's claims sounded in tort or in contract," and stated that where such doubt exists, the longer period should apply. Pet. App. 11-13 (citing authorities). The court of appeals also held that the six-year period did not begin to run until the FDIC was appointed as receiver. *Id.* at 21-23. The court observed that 28 U.S.C. 2415 expressly makes the statute of limitations subject to the conditions of 28 U.S.C. 2416, and that Section 2416(c) provides that periods during which material facts are unknown and could not

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complaint is filed within three years after the right of action first accrues * * *.

[2] The district court also dismissed the indemnity claims on the ground that the depositors had no direct claim against the former officers and directors. Pet. App. 36-38. The FDIC did not appeal this ruling.

reasonably be known to federal officials with responsibility to act must be excluded from the limitations period.[3] The court regarded the policy arguments as "fairly evenly balanced," but viewed this case as "particularly appropriate" for application of the principle that "[s]tatutes of limitations sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." Pet. App. 20-22, quoting *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924)).

ARGUMENT

1. Petitioners contend that this Court should grant certiorari to resolve a purported conflict among the courts of appeals over when the statute of limitations begins to run on claims inherited by the FDIC from insolvent financial institutions (Pet. 7-15). Contrary to petitioners' contentions, the decision of the court of appeals is correct and does not conflict with any decision of another court of appeals. In addition, the issue has been recently and authoritatively resolved by Congress. Accordingly, further review by this Court is not warranted.

The court of appeals correctly held that the statute of limitations on claims of mismanagement against a bank's directors and officers does not begin to run until the FDIC is in a position to pursue such claims. As a practical mat-

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[3] Section 2416 provides, in relevant part:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which –
>
> * * * * *
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances * * *.

ter, directors and officers will not authorize a suit against themselves while they remain in control of the bank. Consequently, the statute of limitations should not begin running while the potential defendants remain in a position to prevent the filing of a complaint. Understandably, no court of appeals has held to the contrary.[4] In addition, only one other court of appeals has considered the effect of Section 2416(c) on claims of wrongdoing obtained by the FDIC from a failed bank, *FDIC* v. *First Interstate Bank*, 885 F.2d 423, 434 (8th Cir. 1989), and that court agrees with the Ninth Circuit that the "FDIC's cause of action did not accrue until * * * the FDIC was appointed receiver." *Id.* at 434. In short, there is no conflict among the circuits as to the application of Sections 2415 and 2416(c) of Title 28 to directors' and officers' liability cases.

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[4] The Eighth Circuit, the Third Circuit, and the First Circuit, as well as the Ninth Circuit in the instant case, have concluded that the statute of limitations does not begin to run until the FDIC is appointed receiver. *FDIC* v. *First Interstate Bank*, 885 F.2d 423 (8th Cir. 1989); *FDIC* v. *Hinkson*, 848 F.2d 432, 435 (3d Cir. 1988); *FDIC* v. *Cardona*, 723 F.2d 132, 134 (1st Cir. 1983). The Tenth Circuit, in cases not involving claims against officers and directors, has concluded that the statute of limitations begins to run on the date on which the cause of action first accrues, not when it is later acquired by the FDIC. *FDIC* v. *Galloway*, 856 F.2d 112, 115-117 (1988); *FDIC* v. *Petersen*, 770 F.2d 141, 142-143 (1985). Both *Petersen* and *Galloway* were FDIC actions to recover from guarantors amounts owing on defaulted promissory notes. Neither case suggests any reason why the banks could not be relied on to pursue claims against the guarantors; neither case involved claims against officers and directors who could not be expected to sue themselves while they remained in office. At least one district court within the Tenth Circuit has not applied the rule of *Petersen* and *Galloway* to FDIC claims against officers and directors for mismanagement. See *FDIC* v. *Hudson*, 673 F. Supp. 1039, 1042-1043 (D. Kan. 1987); *FDIC* v. *Niver*, Civ. No. 85-2642-S (D. Kan. Nov. 6, 1987); *FDIC* v. *Robertson*, Civ. No. 87-2623-S (D. Kan. July 24, 1989).

In any event, the issue petitioner raises is largely academic, because Congress has now specified the applicable rule in Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 232-233 (to be codified at 12 U.S.C. 1821(d)(14)). Section 212(a) of FIRREA expressly provides that the statute of limitations begins to run on the date of FDIC's appointment as conservator or receiver or on the date the cause of action accrues, whichever is later.[5] Section 212(a) of FIRREA now governs this case. See *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 715 (1974).

2. Petitioners also contend (Pet. 15-23) that the Ninth Circuit should have applied Oregon law to decide whether the FDIC's claims are more appropriately characterized as tort or contract claims, and that the courts of appeals are in conflict over whether state law or federal common law governs such determinations. Petitioners concede (Pet. 16 n.17) that the choice of law issue was not presented to the lower courts. For that reason alone, it should not be considered by this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, the court of appeals' decision is correct and does not create a conflict among the circuits. The appellate courts agree that federal law, not state law, governs the rights of the FDIC in this action. *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 456 (1942); *FDIC* v. *Bank of San Francisco*, 817 F.2d 1395, 1398 (9th Cir. 1987); *FDIC* v.

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[5] Section 212(a) of FIRREA, 103 Stat. 232-233 (to be codified at 12 U.S.C. 1821(d)(14)(B)), provides in pertinent part:

> [T]he date on which the statute of limitations begins to run on any claim * * * shall be the later of—
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

Braemoor Assocs., 686 F.2d 550, 553-554 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983). Where no federal statute provides the rule of decision in a case governed by federal law, courts must fashion federal common law. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943). In so doing, courts may either create a uniform federal rule or adopt relevant state law; the choice depends on considerations such as whether a uniform national rule is needed, whether adoption of state law would frustrate the objectives of federal programs, and whether adoption of a national rule would disrupt commercial relationships based on state law. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979).

Contrary to petitioners' assertions (Pet. 17-19), the cases cited in the petition do not demonstrate any conflict on a choice of law issue. Some of the cases cited by petitioners adopt state law as the federal rule of decision. See, *e.g.*, *FDIC* v. *Palermo*, 815 F.2d 1329, 1334-1335 (10th Cir. 1987) (applying Oklahoma law to determine the elements of fraud); *FDIC* v. *Braemoor Assocs.*, 686 F.2d at 554 (applying a presumption in favor of state law in suit to impose constructive trust on monies funneled to defendant by bank president). Other cases conclude that a uniform federal rule is necessary to answer the particular questions presented, see, *e.g.*, *FDIC* v. *Blue Rock Shopping Center*, 766 F.2d 744, 747-749 (3d Cir. 1985) (explicitly creating federal common law based on UCC to govern availability of particular defense to FDIC's action on negotiable instrument), or conclude that state law and federal common law lead to the same result, see, *e.g.*, *FDIC* v. *Bank of San Francisco*, 817 F.2d at 1398 (applying Uniform Commercial Code). Each of these cases employs the analysis outlined in *Kimbell Foods*, either explicitly, see *Braemoor Assocs.*, 686 F.2d at 554; *Bank of San Francisco*, 817 F.2d at 1398; *Blue Rock Shopping Center*, 766 F.2d at 747-748; *Palermo*, 815 F.2d

at 1335; or implicitly, see *Santoni* v. *FDIC*, 677 F.2d 174, 178 (1st Cir. 1982). There is no conflict between these decisions and the present case. Indeed, none of these cases even addressed whether a uniform federal rule should apply to the characterization of causes of action for limitations purposes.

In this case, the court of appeals correctly concluded that a uniform rule should govern the application of a federal statute of limitations to claims asserted by a federal agency in carrying out a nationwide federal program. Two leading cases on the choice between Section 2415(a) and (b), *United States* v. *Neidorf*, 522 F.2d 916, 919 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976), and *United States* v. *Limbs*, 524 F.2d 799, 801 (9th Cir. 1975), both characterize claims for this purpose by reference to federal law. The *Neidorf* court concluded that when the United States brings suit, even if the substantive claim arises under state law,

> the limitation must be determined by reference to section 2415. The characterization of the claim as one in tort, contract or quasi-contract must also be a matter of federal law since the uniform limitations established by the statute would be compromised if limitations varied according to the labels attached to identical causes of action by different states.

522 F.2d at 920 n.6 (citation omitted).

Finally, even if Oregon law were applicable and characterized the FDIC's claims as sounding in tort rather than contract, the outcome of this case would be unchanged. This action was filed within three years of the FDIC's appointment as receiver, and Section 212(a) of FIRREA provides that the limitations period does not begin to run until the appointment of the FDIC. Thus nothing turns on the question whether the three-year period (for torts) or the six-year period (for contracts) applies in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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